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1 **LEWIS**
2 **AND**
3 **ROCA**
4 **LLP**
5 **LAWYERS**

6
7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 **WILLIAM A. MUNDELL**
9 **Chairman**

10 **JAMES M. IRVIN**
11 **Commissioner**

12 **MARC SPITZER**
13 **Commissioner**

Arizona Corporation Commission

DOCKETED

APR 22 2002

DOCKETED BY	<i>[Signature]</i>
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14 **IN THE MATTER OF U S WEST**
15 **COMMUNICATIONS, INC.'S**
16 **COMPLIANCE WITH § 271 OF THE**
17 **TELECOMMUNICATIONS ACT OF**
18 **1996**

Docket No. T-00000A-97-0238

19 **WORLDCOM, INC.'S RESPONSE TO QWEST CORPORATION'S**
20 **COMMENTS ON RECOMMENDED OPINION AND ORDER**
21 **OF THE ADMINISTRATIVE LAW JUDGE**
22 **ON QWEST'S PERFORMANCE ASSURANCE PLAN**

23 WorldCom, Inc., on behalf of its regulated subsidiaries ("WorldCom") submits this
24 response to Qwest's Comments on the Recommended Opinion and Order ("ROO").
25
26

1 On January 30, 2002, the Wyoming Public Service Commission issued its order
2 addressing Qwest proposed performance assurance plan ("PAP"). A copy of that order is
3 attached hereto as Exhibit A
4

5 On February 4, 2002, the Montana Public Service Commission issued its
6 preliminary report addressing Qwest's proposed PAP. A copy of that order is attached
7 hereto as Exhibit B
8

9 On April 6, 2002, the Washington Utilities and Transportation Commission issued
10 its interim order on the Qwest's proposed PAP. A copy of that order is attached hereto as
11 Exhibit C.
12

13 On April 10, 2002, the Colorado Public Utilities Commission issued an order on
14 Qwest's proposed PAP. A copy of that order is attached hereto as Exhibit D. Attached to
15 that order was the Commission's version of the PAP. A copy of the Colorado-ordered
16 PAP is attached hereto as Exhibit E. On April 17, 2002, Qwest accepted the Colorado-
17 ordered PAP with one clarification. A copy of Qwest's verified acceptance of the
18 Colorado-ordered PAP is attached hereto as Exhibit F. A copy of Qwest's motion for
19 clarification is attached as Exhibit G. At this date, that motion has not been ruled upon,
20 however; WorldCom does not object to Qwest's proposed clarification of the Colorado-
21 ordered PAP.
22

23 A review of these decisions will reflect that the rulings in the ROO are very
24 consistent with the orders, decisions and reports in other states where such rulings have
25
26

1 been issued. Accordingly, the Commission should accept the ROO has proposed except to
2 include PO-19 as argued in WorldCom's exceptions.

3 WHEREFORE, WorldCom requests the Commission accept the ROO, except to
4 include PO-19 as argued in WorldCom's exceptions, and reject the requests to modify the
5 ROO as stated in Qwest Comments on the ROO. Due to the expense of copying and
6 mailing these documents, WorldCom also requests that it only be required to file Exhibit's
7 A through G with the official Commission copies. All other parties will be provided
8 electronic copies of Exhibits A through G. If for any reason a party wants a copy of
9 Exhibits A through G, please contact the undersigned.
10
11

12 RESPECTFULLY submitted this 22nd day of April, 2002.

13 LEWIS AND ROCA LLP

14 

15 Thomas H. Campbell
16 40 N. Central Avenue
17 Phoenix, Arizona 85007
18 Telephone (602) 262-5723

19 – AND –

20 Thomas F. Dixon
21 WorldCom, Inc.
22 707 – 17th Street, #3900
23 Denver, Colorado 80202
24 Telephone: (303) 390-6206

25 Attorneys for WorldCom, Inc.
26

1 ORIGINAL and ten (10)
2 copies of the foregoing filed
3 this 22nd day of April, 2002,
4 with:

5 Arizona Corporation Commission
6 Docket Control – Utilities Division
7 1200 W. Washington Street
8 Phoenix, Arizona 85007

9 COPY of the foregoing hand-
10 delivered this 22nd day of April, 2002,
11 to:

12 Maureen Scott
13 Legal Division
14 Arizona Corporation Commission
15 1200 W. Washington Street
16 Phoenix, Arizona 85007

17 Jane Rodda, Administrative Law Judge
18 Arizona Corporation Commission
19 1200 W. Washington Street
20 Phoenix, Arizona 85007

21 Ernest Johnson, Director
22 Utilities Division
23 Arizona Corporation Commission
24 1200 W. Washington Street
25 Phoenix, Arizona 85007

26 COPY of the foregoing mailed
this 22nd day of April, 2002, to:

Lyndon J. Godfrey
Vice President – Government Affairs
AT&T Communications of the
Mountain States
111 West Monroe, Suite 1201
Phoenix, Arizona 85003

Scott Wakefield
Residential Utility Consumer Office
2828 N. Central Avenue
Phoenix, Arizona 85004

LEWIS
AND
ROCA
LLP
LAWYERS

- 1 Mark Dioguardi
Tiffany and Bosco PA
- 2 500 Dial Tower
1850 N. Central Avenue
- 3 Phoenix, Arizona 85004
- 4 Richard M. Rindler
Swidler & Berlin
- 5 3000 K. Street, N.W.
Suite 300
- 6 Washington, DC 20007
- 7 Maureen Arnold
US West Communications, Inc.
- 8 3033 N. Third Street
Room 1010
- 9 Phoenix, Arizona 85012
- 10 Jeffrey W. Crockett
Snell & Wilmer
- 11 One Arizona Center
Phoenix, Arizona 85004-0001
- 12 Richard P. Kolb
Vice President – Regulatory Affairs
- 13 OnePoint Communications
Two Conway Park
- 14 150 Field Drive, Suite 300
Lake Forest, Illinois 60045
- 15 Andrew O. Isar
TRI
- 16 4312 92nd Avenue N.W.
Gig Harbor, Washington 98335
- 17 Eric S. Heath
Sprint Communications Company L.P.
- 18 100 Spear Street, Suite 930
San Francisco, CA 94105
- 19 Steven J. Duffy
Ridge & Isaacson P.C.
- 20 3101 N. Central Avenue
Suite 1090
- 21 Phoenix, Arizona 85012-1638
- 22 Timothy Berg
Fennemore, Craig, P.C.
- 23 3003 N. Central Avenue
Suite 2600
- 24 Phoenix, Arizona 85012-3913
- 25
- 26

1 Charles Steese
Qwest
2 1801 California Street, Ste. 5100
Denver, Colorado 80202

3 Joan S. Burke
4 Osborn & Maledon
2929 N. Central Avenue
5 21st Floor
Phoenix, Arizona 85067-6379

6 Richard S. Wolters
7 AT&T & TCG
1875 Lawrence Street
8 Suite 1575
Denver, Colorado 80202

9 Michael M. Grant
10 Todd C. Wiley
Gallagher & Kennedy
11 2575 E. Camelback Road
Phoenix, AZ 85016-4240

12 Raymond S. Heyman
13 Michael Patten
Roshka Heyman & DeWulf
14 Two Arizona Center
400 Fifth Street
15 Suite 1000
Phoenix, Arizona 85004

16 Diane Bacon, Legislative Director
17 Communications Workers of America
5818 North 7th Street
18 Suite 206
Phoenix, Arizona 85014-5811

19 Bradley Carroll, Esq.
20 Cox Arizona Telcom, L.L.C.
1550 West Deer Valley Road
21 Phoenix, Arizona 85027

22 Joyce Hundley
United States Department of Justice Antitrust Division
23 1401 H Street, N.W.
Suite 8000
24 Washington, D.C. 20530

1 Daniel Waggoner
Davis Wright Tremaine
2 2600 Century Square
15011 Fourth Avenue
3 Seattle, Washington 98101-1688

4 Elaine Miller
NextLink Communications, Inc.
5 500 108th Avenue NE, Suite 2200
Bellevue, Washington 98004

6 Mark N. Rogers
7 Excell Agent Services, LLC
2175 W. 14th Street
8 Tempe, Arizona 85281

9 Traci Grundon
Davis Wright Tremaine LLP
10 1300 S.W. Fifth Avenue
Portland, Oregon 97201

11 Mark P. Trinchero
12 Davis Wright Tremaine LLP
1300 S.W. Fifth Avenue, Suite 2300
13 Portland, Oregon 97201

14 Gena Doyscher
Global Crossing Local Services, Inc.
15 1221 Nicollet Mall
Minneapolis, Minnesota 55403-2420

16 Penny Bewick
17 New Edge Networks, Inc.
P.O. Box 5159
18 Vancouver, WA 98668

19 Jon Loehman
Managing Director-Regulatory
20 SBC Telecom, Inc.
5800 Northwest Parkway
21 Suite 135, Room I.S. 40
San Antonio, TX 78249

22 M. Andrew Andrade
23 5261 S. Quebec Street
Suite 150
24 Greenwood Village, CO 80111

1 Karen Clauson
2 Eschelon Telecom, Inc.
3 730 2nd Avenue South
4 Suite 1200
5 Minneapolis MN 55402

6 Megan Doberneck
7 Covad Communications Company
8 7901 Lowry Boulevard
9 Denver, CO 80230

10 Brian Thomas
11 Vice President Regulatory – West
12 Time Warner Telecom, Inc.
13 520 S.W. 6th Avenue
14 Suite 300
15 Portland, Oregon 97204

16 Andrea P. Harris
17 Senior Manager, Regulatory
18 Allegiance Telecom, Inc. of Arizona
19 2101 Webster, Suite 1580
20 Oakland, CA 94612

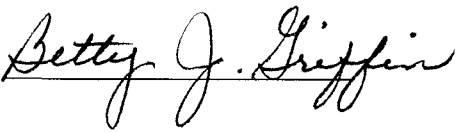
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26


EXHIBIT A

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE APPLICATION)
OF QWEST CORPORATION REGARDING)
RELIEF UNDER SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS ACT)
OF 1996, WYOMING'S PARTICIPATION)
IN A MULTI-STATE SECTION 271)
PROCESS, AND APPROVAL OF ITS)
STATEMENT OF GENERALLY)
AVAILABLE TERMS)
)

Docket No. 70000-TA-00-599
(Record No. 5924)

FIRST ORDER ON GROUP 5A ISSUES
(Issued January 30, 2001)

This matter is now before the Wyoming Public Service Commission (Commission) for consideration of the Group 5A issues concerning the public interest and the Qwest Performance Assurance Plan (QPAP). The federal Telecommunications Act of 1996, at 47 U.S.C. § 271, sets forth some specific criteria for the nature of the access and interconnection Qwest Corporation (Qwest) must offer to competitors before it is allowed into the in-region interLATA market in Wyoming. We must also determine the extent to which Qwest's Statement of Generally Available Terms (SGAT) for Wyoming provides for the development of a competitive telecommunications market in Wyoming under Sections 251 and 252 (d) and (f) of the federal Act. Overriding considerations in this portion of the proceeding are focused on the broad issues of how Qwest should be expected to perform in a post-271 environment and whether granting it the authority to offer in-region originating interLATA services serves the public interest. The Commission, having reviewed the Workshop Report materials filed in this portion of the proceeding and the written comments and arguments of the parties, having heard oral arguments in open hearing, having reviewed applicable telecommunications utility law and its files concerning this case and the participants, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

1. On October 22, 2001, the consultant retained by the states participating in the Qwest Section 271 multi-state compliance proceeding (the Consultant), with the assistance of state commission staff members, issued his Report on Qwest's Performance Assurance Plan and on the same day issued his Public Interest Report (when referred to collectively, the Workshop Reports) giving recommendations to the participating commissions on the disposition of Group 5A issues in this case.

2. To provide for the full and fair consideration of the Group 5A issues, the Commission, on November 6, 2001, issued its Order Providing for Separate Consideration of Group 5 and Group 5A Issues, and Setting Oral Arguments and Deliberations on Group 5 and Group 5A Issues.

3. Pursuant to due notice, the Commission held oral arguments on Group 5A workshop issues beginning at 9:00 a.m. on December 10, 2001, in the Commission's hearing room in Cheyenne, Wyoming. Qwest and the Consumer Advocate Staff appeared through counsel and participated to the extent they deemed necessary in the proceedings. QSI Consulting participated in the proceeding as consultants and advisors to the Commission.

4. The Commission's deliberation in this portion of the case was held on January 18, 2002 at 2:00 pm, at the Commission's hearing room in Cheyenne, Wyoming, pursuant to its Second Order Rescheduling Deliberations on Group 5A Issues. At the deliberation, the Commission directed the preparation of this order consistent therewith.

The Qwest Performance Assurance Plan

5. The QPAP is intended to provide assurances that Qwest will live up to its obligations under Section 271 if it is allowed to enter the in-region originating interLATA market. We understand from the Federal Communications Commission that it clearly does not expect that all post-entry performance plans, like the QPAP, will be identical:

"We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace." (Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.)

The FCC has also developed a simple and logical set of criteria for evaluating the QPAP and similar plans on a rational and consistent basis. Plans should contain:

- Meaningful and significant incentive to comply with designated performance standards;
- Clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance;
- Reasonable structure designed to detect and sanction poor performance when and if it occurs;
- A self executing mechanism that does not open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.

6. After a review of the Workshop Report on the Qwest QPAP, the transcript of the oral arguments presented to us and other material in the record of this proceeding, including multi-state material, we find that the QPAP in its latest iteration generally satisfies the evaluation criteria for such plans; and we accept and adopt the Workshop Report on the QPAP, except as specifically discussed below. Regarding the nature of the QPAP, it is Exhibit K to the Qwest Wyoming SGAT; and it is designed to give a measure of assurance that Qwest will be adequately motivated to sustain an acceptable level of market openness and fair dealing with competing local service providers after, and if, Section 271 approval is ultimately granted to it. The QPAP

is heavily enmeshed in federal and state telecommunications law and public policy and is not, either by itself or as a part of the SGAT, capable of being analyzed merely as a simple contract.

7. Regarding the Workshop Report's recommended 36% cap on payments by Qwest under the QPAP, we find no evidence proving the advisability of a particular cap in terms of a specific percentage or otherwise. Likewise, we find that there has been no demonstration of a reason to place a dollar limit on compensation derived from such a cap. If the reason for a cap is simply to limit Qwest's liability to a certain level which it supports or does not oppose, that is not a sufficient reason for the existence of a particular arbitrary cap. The dynamism of competitive telecommunications markets keeps a fixed cap from being a "meaningful and significant incentive to comply" with performance standards. The artificiality of a cap also introduces many administrative and other complications into the administration of the QPAP. Further, it could focus the behavior of competitors on obtaining compensation rather than concentrating on competing. Not having a cap comes much closer to creating a "reasonable structure designed to detect and sanction poor performance when and if it occurs" and is more apt to function as "a self executing mechanism . . ." which does not rely on the regular intervention of courts, regulators or special masters to make the QPAP function adequately. It is impossible to state that a payment cap would continue into the future to be either "meaningful" or "significant." We can state that a cap would be less so, and Qwest has termed the cap, as proposed by the Consultant, to be "reasonable." (See, Qwest's November 7, 2001, Comments on the Facilitator's Final QPAP Report, p. 2.) We note that the purpose of the QPAP is not to limit Qwest's liability for poor performance but to provide incentives discouraging that type of performance.

8. The Workshop Report on the QPAP proposes that some Tier 2 payments, those which go to the states rather than individual companies, begin after a three-month period of non-compliant performance. The Workshop Report analysis also bases Tier 2 payment liability in part on whether or not the prohibited behavior has a Tier 1 counterpart. Here, the most important decisional criterion is that the QPAP should "detect and sanction poor performance when and if it occurs." Therefore, if certain poor performance violates the QPAP, the penalty should attach at once rather than after a period of time has elapsed. We do not believe that a "meaningful" penalty is created when prohibited behavior is allowed to continue over a period of time before it is penalized. The proper approach here, if there were any objection to Tier 2 payments, would be to object to the characterization of the behavior as prohibited or to object to the level of penalty payment associated with it. We will discuss a QPAP modification process below. We note here our conclusion that Tier 2 payments should be made to the Wyoming Universal Service Fund for the benefit of all Wyoming telecommunications subscribers, whether or not they reside in Qwest service areas. Although the "penalty" value for Qwest would appear to be lessened by this use of the funds, it is appropriate and the beneficiaries are the consumers themselves rather than the companies providing the service.

9. The Workshop Report advocates that payments under the QPAP be allowed to escalate during the period of noncompliance by Qwest to increase the motivation for Qwest to change its behavior. However, the Workshop Report also suggests that the escalation stop after six months, and Qwest supports this additional limitation on its potential QPAP liability. (Workshop Report on the QPAP, p. 44.) We do not believe it is the role of the QPAP to set a

price on noncompliance but to encourage it not to happen or to correct such noncompliant behavior if it occurs. Therefore, we do not believe that an arbitrary limit on escalation of payments is warranted or demonstrated to be necessary. Qwest has argued, testified and shown us documentary evidence that it is either meeting its performance indicators or working hard to do so in the future. If this is true, the likelihood of payments under the QPAP is relatively low and should be considered by Qwest as a manageable financial risk largely under its own control. Additionally, we have not been provided with cogent reasons why there should be a limit on the escalation of payments or that a limit of six months is somehow compelled by the facts of the case. We therefore will allow the escalation of QPAP payments without a time limit.

10. The Workshop Report on the QPAP advocates that payment levels should de-escalate after a certain period of corrected performance. The argument seems to be that lowering payment levels should be considered a reward for good behavior by Qwest. We disagree. The actual reward for good behavior should be not having to make payments under the QPAP because Qwest's performance complies with it. The idea of encouraging good behavior and then lessening the payment for bad behavior as a reward for an interim period of good behavior is a perverse incentive. We therefore decide that escalated penalties should be "sticky." That is, once a payment has escalated to a level at which Qwest complies with a provision of the QPAP, that particular payment should remain at that level. Again, compliance should be rewarded and this is the better way to encourage this behavior. The QPAP should not lend itself to a "cost-benefit" analysis under which the price of noncompliance might be weighed and found by Qwest to be an acceptable cost of doing business.

11. It is possible that litigation between Qwest and a local service competitor could arise if problems could not be otherwise resolved under the QPAP or the SGAT. The QPAP draft removes the ability of a competitor to go into court and sue Qwest for contract damages or damages that could be proven under a contractual theory of liability. It would force the competitor to elect the QPAP as a "liquidated damages" remedy. It would be a mistake to consider the QPAP or the SGAT in general as a simple contract; and it would be a further mistake to require simple precepts of general contract law to limit its effectiveness. The QPAP is a document based on the requirements of federal telecommunications law, and its formation is driven not by a mutual desire to engage in local exchange telecommunications service competition but by the legal requirement that Qwest's local markets be fairly opened to competition. Qwest's goal is not simply to open its local markets but to be allowed into the lucrative in-region interLATA originating long distance market now denied to it by law. Thus the analysis of this case and the QPAP has public policy and public interest dimensions beyond simple contract law. None of the parties to either the Wyoming or the multi-state proceeding could produce evidence showing that there could not be instances in which the QPAP might be an inadequate remedy for unfair, anticompetitive or monopolistic behavior by Qwest. We also do not believe that we, or any of the parties, can foretell the future with sufficient accuracy to say that the QPAP is now a perfect remedy and that it suffices in all cases. Therefore, we will not allow the QPAP to limit the ability of a competitor to go into court on *any* theory of liability or with regard to any element of damages. The avenues to recovery should be open for Qwest and its competitors. Even though QPAP payments should suffice to compensate CLECs, there may be instances in which poor performance by Qwest causes unusually high losses by competitive

local exchange carriers. The QPAP and the SGAT should allow CLECs to recover these losses through court action if there is a valid cause of action.

12. We agree with the FCC that the QPAP should be "a self executing mechanism that does not open the door unreasonably to litigation and appeal." This is one of the reasons for our conclusions on payments as stated above. However, we also do not want the QPAP to become simply a profit source for potential competitors. Double recovery, under the QPAP and in court, should not be allowed to happen. Therefore, Qwest should be able to offset against any ordered award any sum it proves to the tribunal to be a valid offset of QPAP payments directly related to the subject matter of the proceeding.

13. The QPAP wisely provides that it should be reviewed every six months but less wisely restricts the issues which can be discussed and least wisely gives Qwest the power to veto any changes. Our directions in this order make adequate provision for the initial functioning of the QPAP, but we realize that there is much that cannot be known about the future behavior of the dynamic and volatile telecommunications markets. Qwest's reaction to this problem was, *inter alia*, to place limits on its liability and give itself veto power over changes in the QPAP. We do not believe that this is the best course of action. The Commission has only the public interest to look after and is not a partisan force in the process. We have also developed considerable familiarity and experience with the issues so ably presented by the parties to the Wyoming and multi-state Section 271 process. The better model for modification of the QPAP is a proceeding before the Commission which preserves the due process and other rights of the parties and retains the Commission's ability to act in the public interest regarding this document. Reviews of the plan should be made by the Commission in light of Wyoming-specific issues and the subjects which may be addressed should not be circumscribed. This will function as a protection for all parties. For example, if it appears later that competitive local exchange carriers are abusing Qwest under the QPAP or that limits should, *in the light of actual Wyoming experience*, be placed on Qwest's potential obligations, this can be done at that later time. Review should be periodic and the six month interval suffices, but parties should be able to come before the Commission at any time if a serious problem arises. At once, this answers the question of whether Qwest should have to endure unbearable burdens under the QPAP and the question posed by the Consumer Advocate Staff regarding how to plan for a competitive future with so many unknowns and a lack of a Qwest track record on the subject. This ability to bring the document back before the Commission for public proceedings to reform it, in whole or in part, will also help to adjust for situations unique to the Wyoming market, the availability of technological solutions to problems or otherwise in which a lack of performance by Qwest should not be penalized at all because the company is not at fault. This is the type of protection that should be afforded rather than allowing the document to be inflexible. We do not believe that it would be realistic for Qwest to be required to develop a track record before it moves into its desired long distance market, but we also believe that we must therefore make adequate provision so that the QPAP remains a viable tool for the fair encouragement of local service competition -- goals shared by the federal Act and the Wyoming Telecommunications Act of 1995.

14. Because the QPAP is designed to promote good behavior by Qwest in its local markets as the quid pro quo for allowing it to enter the in-region interLATA originating long

distance market, we do not believe that it should go into effect until Qwest obtains this authority from the FCC.

The Public Interest

15. 47 U.S.C. § 271(d)(3) lists the findings which the FCC would have to make in order to grant Qwest's request for Section 271 relief once it is filed. 47 U.S.C. § 271(d)(3)(C) requires a finding that "the requested authorization is consistent with the public convenience and necessity." Because this criterion is stated separately from the Section 271 competitive checklist and the other specific things Qwest must prove under the federal Act, it must therefore be read as a separate requirement. We agree with the FCC that this public interest criterion allows a general review of all of the facts and circumstances in the case to see whether the intent that local markets be fairly opened to competition is likely to be frustrated. Qwest does not, in our opinion, have the burden of raising and disproving every possible problem imaginable. Their burden is to provide the demonstrations required by the federal Act, but they need only to rebut any allegations by others as to special problems or circumstances which might warrant not granting the recommendation sought by Qwest here. In general, we agree with the comments of the Consultant in the Workshop Report that Qwest has satisfied the generalized public interest requirement of the federal Act; but this agreement is conditional. It is based in part on the existence of a QPAP consistent with our findings and conclusions above. Our agreement on the public interest issue is also conditioned on a satisfactory showing in the Regional Oversight Committee's independent Operational Support System test and the emergence therefrom of Performance Indicator Definitions (PIDs) satisfactorily identifying and covering the necessary performance by Qwest to show that there are "clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance."

16. Regarding the public interest issues concerning Unbundled Network Element (UNE) prices and intrastate access charges brought up by the Workshop Report on public interest issues, we agree with the Report that these issues are best left to the states. We also note that the pricing provisions of the Wyoming Telecommunications Act of 1995 have mooted, in Wyoming and at least for the time being, many of the questions raised about overpriced access and the unrealistic relationship of UNE prices to local service prices which exist in some other states.

Further Proceeding on Group 5A Issues

17. The changes which we have directed hereinabove require numerous revisions to various parts of the QPAP to comply with our directives and to remove language rendered superfluous. We will not therefore try to rewrite the QPAP but direct that Qwest do so, starting with its November 6, 2001, draft version of the "Exhibit K" QPAP, and incorporating all of the changes required by this order. Qwest shall thereafter file the revised QPAP with the Commission and serve copies on all parties to the Wyoming proceeding on or before February 28, 2002. With this filing it must also submit conforming changes necessary to bring the SGAT into harmony with the revised QPAP. The Commission will thereafter hold a public hearing on the revised QPAP beginning at 9:00 a.m. on Monday, March 18, 2002, at its hearing room at 2515 Warren Avenue, Suite 300, Cheyenne, Wyoming.

18. Our findings and conclusions hereinabove are supported by the substantial evidence in the record of this proceeding, including evidence adduced in the multi-state proceeding.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. Qwest shall promptly file a changed QPAP conforming to the directives hereinabove and the same shall be considered in public hearing, all at the times appointed hereinabove.

2. Conditioned on the development of a conforming QPAP, proper PIDs and the successful completion of the ROC OSS test, the Commission recommends that Qwest has satisfied the general public interest criteria as described hereinabove.

3. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on January 30, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

KRISTIN H. LEE, Commissioner

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel

EXHIBIT B

Service Date: February 4, 2002

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Investigation into)	UTILITY DIVISION
Qwest Corporation's Compliance with)	
Section 271 of the Telecommunications Act)	DOCKET NO. D2000.5.70
of 1996)	

**PRELIMINARY REPORT ON QWEST'S PERFORMANCE ASSURANCE PLAN AND
REQUEST FOR COMMENTS ON FINDINGS**

Introduction

This report contains the Commission's preliminary findings as to whether Qwest's performance assurance plan (QPAP) is sufficient to ensure the local phone service market in Montana will remain open after Qwest obtains Section 271 approval from the Federal Communications Commission (FCC). Evaluation of the QPAP is one part of the Commission's analysis of Qwest's compliance with the public interest requirements of Section 271.

In its orders regarding Section 271 applications, the FCC clearly indicates that a successful 271 application must have mechanisms in place to ensure that the efforts the regional Bell companies like Qwest have taken to open up their local service markets are maintained after they win Section 271 approval. Companies that have obtained 271 approval to date have demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan. The FCC identifies five key characteristics it looks for when evaluating whether a performance assurance plan satisfies the public interest. According to the FCC, a plan should contain:¹

- Potential liability that provides a meaningful and significant incentive to comply with the plan's performance standards;

¹ Bell Atlantic New York Order 15 FCC Rcd at 4166-67, para. 433.

- Clearly articulated, pre-determined measures and standards that encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self-executing mechanism that does not open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.

Qwest's performance assurance plan was addressed by the participants in written comments, in two separate in-person workshops in August 2001, and in briefs. John Antonuk, the consultant hired by the nine states participating in the QPAP proceeding to conduct the workshops, issued his *Report on Qwest's Performance Assurance Plan* on October 22, 2001. Antonuk was hired to conduct these workshops after the predecessor post-entry performance plan (PEPP) collaborative process had ended without Qwest and competitive local exchange carriers (CLECs) achieving a consensus plan. In his *Report*, Antonuk reviewed the issues raised by the participants and made recommendations regarding the QPAP for Commission consideration. Participants in the Montana PSC docket that filed comments in response to Antonuk's *Report* were Qwest, AT&T, Covad Communications, Montana Consumer Counsel (MCC) and WorldCom. On November 8, 2001, the Commission received Qwest's replacement filing commenting on Antonuk's *Report*, including a redline version of its June 29, 2001 QPAP. The redline version identifies Qwest's clarifications and modifications of certain Antonuk resolutions, and where Qwest agrees with his *Report*. This redline version of the QPAP is posted on the Commission's internet website at this location: <http://psc.state.mt.us/tcom/tcom.htm>.

This preliminary report summarizes Antonuk's *Report* as well as the comments filed on the *Report*. Participants to this proceeding are invited to comment on the preliminary findings in this report. The Commission respectfully requests each commenting party to connect clearly its comments consistent with the structure and outline of issues in this report. Comments must be filed with the Commission by February 25, 2002. The Commission will then review those comments and reach a final decision on whether the QPAP satisfies the public interest test in Montana.

SUMMARY OF ANTONUK'S REPORT, PARTICIPANTS' COMMENTS, AND COMMISSION PRELIMINARY FINDINGS

There are many recommendations made by Antonuk in his *Report* that are uncontested by the participants in this proceeding. Unless otherwise addressed in this preliminary report, the Commission adopts those recommendations.

The more general comments of the parties include the following. In its comments WorldCom concurs in the exceptions AT&T takes to the report and joins in the arguments AT&T raises to support WorldCom's positions taken herein. The MCC filed comments that take exception to several aspects of the Antonuk's *Report*. Covad asserts that the sole criterion by which to measure the QPAP is by whether it "fosters competition in the local exchange market."

Achieving this goal depends on a finding that Qwest's entry into the long distance market is in the public interest. In regards to this Montana PAP, the public interest test is met only when a mechanism is in place to ensure that the local market is irreversibly open to competition and that wholesale service quality will not deteriorate after Qwest receives 271 relief. As incumbents lack the incentive to help competitors, Covad adds that the FCC strongly encourages monitoring of post-entry wholesale service performance by a PAP and the ultimate question Commission must address is whether to accept Antonuk's resolutions or adopt positions advanced by others.

The structure of this report mirrors the organization of Antonuk's *Report* and groups issues raised by the participants under five sections. Each section corresponds to the five QPAP characteristics outlined by the FCC in its orders on performance assurance plans.

I. MEANINGFUL & SIGNIFICANT INCENTIVE

A. Total payment liability.

1. 36% of intrastate net revenues standard. Antonuk agreed with Qwest that the appropriate amount of revenue to place at risk each year under the QPAP is 36% of Qwest's 1999 net intrastate revenues as reported to the FCC on its ARMIS return. For Montana, the 36% standard results in Qwest having \$16 million at risk each year under the QPAP. Antonuk reasons that the FCC has

approved this amount as it provides a meaningful incentive to provide adequate performance in its 271 orders in other states. He finds the 36% standard an appropriate starting point, to be examined again in the context of all the other QPAP provisions affecting Qwest's incentive to perform.

Covad comments

Covad opposes a 36% hard cap because it will under compensate CLECs, is inconsistent with the purpose of a performance assurance plan, is not in the public interest and should be rejected. Annual caps may under compensate CLECs. The "injustice of undercompensation" is underscored by the fact that CLECs receive no compensation for the numerous orders that are cancelled when Qwest's service quality is deficient. As the cap serves only to limit Qwest's exposure to penalties, it is counter-intuitive as caps are only reached when penalties are insufficient incentive for Qwest to provide adequate service quality. Based on a recent Colorado Commission order, Covad recommends changes to the QPAP. As the Colorado Commission ordered, there should be a soft, procedural, cap and instead of a 36% procedural cap, Covad recommends New York's 44% cap. Covad notes the Utah Commission Staff's observation that the New York Commission raised the cap to 44% "after the failure of an initial 36% cap."

Commission preliminary finding: Because the amount of any proposed cap is inseparable from the below issue of procedural versus absolute caps, the Commission's finding follows the latter discussion.

2. Procedural cap vs. absolute cap. Instead of either a procedural cap (which can rise if Qwest's performance under the plan is so bad that its payments exceed the amount of the cap) or an absolute cap (which could not be raised no matter what), Antonuk prefers a "sliding" cap that has the following attributes:

- The Commission could order the 36% cap to increase by no more than 4 percentage points when the cap is exceeded by 4 percent or more for any 24-month consecutive period, if:
 - the Commission finds Qwest could have stayed under the cap through its reasonable and prudent efforts, and
 - that finding has been made after the Commission reviews the results of root-cause analyses and has provided Qwest the opportunity to be heard.
- The Commission could order the cap to decrease by no more than 4 percentage points when Qwest's total payment liability is 8 or more percentage points (i.e., 26% or less) below the cap amount for 24 consecutive months, if:
 - the Commission finds the performance results occurred because of an adequate Qwest commitment to provide adequate service, and
 - that finding is made after all interested parties have an opportunity to be heard.
- The sliding cap applies to the next 24-month period beginning at the completion of the first 24-month period, provided that the maximum cap increase is 8 percentage points and the maximum cap decrease is 6 points.

Qwest comments

Whereas it deviates from the "hard 36% annual cap", Qwest finds Antonuk's approach reasonable and amends the QPAP (Section 12.2) to allow the cap to range between 44% and 30%.

AT&T comments

AT&T objects to Antonuk's "sliding cap" proposal because: (1) it provides for a 4% increase to the cap only after CLECs have been denied payments due to the

cap for 2 years, during which time Qwest could exceed the cap for months at a time with impunity; (2) the FCC has never authorized a plan where total liability was less than 36% of net intrastate revenues, yet Antonuk's proposal allows the cap to decrease down to 32%; (3) the sliding cap proposal was not advocated or requested by any party, including Qwest. AT&T recommends as better solutions to the cap issue either the Utah Staff proposal or the Colorado approach. The Utah Staff proposal raises the cap to 44% of net intrastate revenues as the New York commission did, and provides for up to a 4-percentage-point increase in the cap if Qwest exceeds the cap for 12 straight months. In Colorado, according to AT&T, there is no cap on Tier 1 payments (to CLECs) but Tier 2 payments (to states) are subject to a procedural cap. The Colorado commission may raise the cap if Qwest's payment liability equals or exceeds the annual cap for two consecutive years or if two consecutive months' worth of payments equal or exceed one-third of the annual cap. AT&T notes that Bell South's recent 271 applications to the FCC for Georgia and Louisiana included performance plans that, in Georgia, puts 44% of Bell South's 1999 intrastate net revenues at risk and, in Louisiana, does not limit Bell South's payment liability (although it includes a procedural cap of 20% of 1998 net revenues).

MCC comments

MCC finds unnecessary the raising and lowering of caps as resolved in the Report, the so-called "sliding scale", and instead favors Qwest's 36 % cap proposal. MCC finds the cap reasonable for several reasons: (1) the incentive risk is substantial and will likely encourage service and performance at parity to what Qwest's retail customers receive, (2) sliding caps are potentially harmful and should be changed based on evidence explaining why performance declines and (3) a changed cap may trigger less acceptable performance for the majority of Qwest's retail customers.

Covad comments

Adjusting the cap upward or downward is not acceptable to Covad.

Commission preliminary finding: The Commission is presented with four different options regarding the annual cap on total payment liability. The key benefits and drawbacks of each option are explained below:

1. Antonuk's proposal for a "sliding cap."

Antonuk determines that, because there is not much experience anywhere yet with performance assurance plans, it would be prudent to allow movement of the cap – up or down --- within a confined range in certain defined circumstances. Qwest prefers the hard 36% cap, but agreed to incorporate Antonuk's proposal instead. AT&T, Covad and MCC objected to the sliding cap proposal for the reasons identified above. Chief objections are that the FCC has never approved a plan that allows the cap to decrease below 36% and that the proposal allows too much time to pass between Qwest's noncompliant performance in excess of the cap and implementation of a higher cap. Essentially, this is a procedural cap with undesirable attributes.

2. "Hard" cap of 36% of net intrastate revenues.

The FCC has found the 36% standard sufficient to create a meaningful and significant incentive to perform for other Bell operating companies seeking 271 relief. MCC recommends the hard 36% cap. AT&T and Covad object to a hard cap because it could result in Qwest not providing compensation to CLECs who had been harmed by Qwest's noncompliant performance.

3. AT&T and Covad also argued that the cap amount should be set at 44% rather than 36%.

4. **“Procedural” cap of 36% of net intrastate revenues.**

Antonuk found that a procedural cap exposes Qwest to unknown risk. He reasons that, just as CLECs are able to decide whether the costs of entering the competitive local market are too high, so should Qwest. A procedural cap reduces Qwest’s ability to determine its payment liability exposure under the QPAP. Qwest and MCC do not support a procedural cap. AT&T and Covad support the Colorado approach to a procedural cap.

Of the above options the Commission finds that a 36% procedural cap is preferable to the other options. The Commission invites comments on how to implement a 36% procedural cap. Comments should address the criteria by which the cap would rise and, if so, how high it may rise.

3. Tier 1 percentage equalization when cap is reached. If the cap is reached in any year, a problem may occur due to the operation of a cap: while CLECs who incur noncompliant service from Qwest up to that point receive compensation, CLECs who incur noncompliant service after the cap is reached receive no compensation. To address this problem, Antonuk recommends the following method of equalization at the end of each year when the cap is reached:

- a. The amount by which any month’s total payments exceed $1/12^{\text{th}}$ of the annual cap shall be apportioned between Tier 1 and Tier 2 according to the percentage that each Tier bears of the total payments for the year to date. Antonuk refers to the results of this calculation as the “tracking account.”

- b. Tier 1 excess will be debited against ensuing payments that are due to each CLEC by applying to the year-to-date payments received by each a percentage that generates the required total Tier 1 amount.
- c. The tracking amount will be apportioned among all CLECs so as to provide each one with payments equal in percentage to its total year-to-date Tier 1 payment calculations.
- d. This calculation begins in the first month that payments are expected to exceed the annual cap and continues in each month of that year. Qwest will recover any debited amounts by reducing payments due from any CLEC for that month and any succeeding months as necessary.

Qwest comments

Qwest does not oppose Tier 1 equalization. Qwest incorporates Antonuk's language into the QPAP (12.3) but with some changes it views necessary to clarify the operation of the complex process. Because QPAP monthly payments may fall below or exceed the monthly cap, accounts must be balanced using year-to-date payments and a cumulative monthly cap.

Commission preliminary finding: The Commission finds merit in Antonuk's recommendation to equalize payments to CLECs. Because Qwest modified Antonuk's recommendation, the Commission invites comments on how Qwest proposes to implement Antonuk's recommendation. (See QPAP Section 12.3.)

- 4. Qwest's marginal costs of compliance. Because he found no evidence to enable its use, Antonuk rejects the New Mexico Staff's proposal that the proper inquiry is not the size of the payments to CLECs, but Qwest's marginal costs of noncompliance.

5. Continuing propriety of a cap based on 1999 net revenues. Antonuk rejects ELI/Time Warner/XO Utah's proposal to not always base the cap on 1999 net revenues. Antonuk reasons it is preferable to rely upon the firm amount represented by the 1999 net revenues than it would be to accept the uncertainty of the amount of the cap fluctuating up or down.

Covad comments

Covad disputes Antonuk's decision to always base caps on 1999 net revenues and prefers a more recent -- year 2000 ARMIS -- basis. Covad's principal reason is the inability of 1999 data to capture post Qwest-US West merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."

Commission preliminary finding: The Commission agrees with Covad that the cap amount should be revised yearly to reflect the company's most recently reported amount of net intrastate revenues.

6. Likely payments in low-volume states. Antonuk addresses New Mexico Staff's concern that the QPAP will not provide Qwest with sufficient incentive to provide compliant service in states with low order volumes by noting that the QPAP will provide for minimum payments.

7. Deductibility of payments. Antonuk dismisses WorldCom's concern that Qwest may be able to deduct QPAP payments for income tax purposes because the QPAP in this respect is no different than other performance assurance plans considered by the FCC.

Commission preliminary finding: The Commission sees a relation between the income tax deductions Qwest may take for QPAP payments and the earlier issue of Qwest's total payment liability. Qwest appears to assert that if a 36% cap is combined with 1999 ARMIS net revenues, it faces about a \$16

million dollar exposure in Montana. However, the net impact of such a penalty is less due to Qwest's apparent right to tax offsets for Tier 1 and Tier 2 payments.² If payments to CLECs or to a state are offsets to tax obligations, then while the purpose of such payments is, in part, achieved, unless the consequence on Qwest of such payments was designed to account for tax effects, the objective is not achieved.³ This, in part, is one reason a 36% hard cap is favored less than a procedural cap. The Commission is interested in further explanation on how the tax offsets are shared between state and federal tax obligations, by how much Montana tax revenue might decrease with the offset and if there is a rollover provision in the tax code that permits Tier 1 and/or Tier 2 payments to offset tax obligations in years subsequent to the year in which the payments were actually made.

B. Magnitude of payout levels.

Antonuk rejects CLEC claims that the QPAP payout levels are too low. He finds the payout information that Qwest submits to demonstrate that Qwest's cost of noncompliance is significant and substantial under the QPAP.

C. Issues related to compensation for CLEC damages.

1. Relevance of compensation as a QPAP goal. Antonuk rejects arguments (Z-Tel's and others') that the purpose of a PAP is to create incentives to detect and sanction poor performance, not to compensate CLECs for harm, and that the payments to CLECs are not liquidated damages. Antonuk adds that the FCC couches its test in terms of incentives, but an elementary legal principle in the field of remedies is the public interest in holding parties responsible for the damages they cause to induce them to behave in ways to avoid such harm.

² See Qwest's response to data request PSC -144.

³ See Qwest's response to data request PSC -146.

Antonuk concludes it is appropriate for the QPAP to address the issue of CLEC compensation for contractual damages, and it is appropriate that the QPAP liquidate such damages.

AT&T comments

AT&T objects to Antonuk's position that the QPAP is a liquidated damages contract. AT&T argues the QPAP is similar to a commercial liquidated damages contract, but there are important differences, such as: the QPAP's main purpose is to ensure that Qwest continues to deliver compliant service to CLECs; Qwest offers the QPAP in order to meet the public interest requirements of Section 271; the QPAP contemplates substantial governmental intervention and control; the SGAT (which includes the QPAP) is mandated by the federal Telecommunications Act; Qwest is required by law to negotiate in good faith; and states receive payments under the QPAP absent any contractual relationship with Qwest.

Covad comments

Covad asserts that the SGAT into which the QPAP is folded is not an "ordinary commercial contract" but rather a "hybrid" contract.

Commission preliminary finding: The Commission finds that, while the QPAP is similar to a typical commercial liquidated damages contract between two parties, it also serves other purposes such as those identified in AT&T's comments.

2. Evidence of harm to CLECs. Antonuk finds Qwest to argue correctly that CLECs did not provide evidence in this proceeding to show what their damages had been or would be.

AT&T comments

AT&T claims that once Antonuk decided the QPAP is a liquidated damages contract, as opposed to being similar to one, he then took the CLECs to task for

failing to quantify their damages. AT&T argues this is a burden placed on it inappropriately by Antonuk, but even so, claims it was prohibited in this proceeding from providing evidence of damages it suffers when Qwest's service is noncompliant. According to AT&T, examples of damages include the costs of unutilized or underutilized AT&T personnel, equipment and marketing due to Qwest's failure to provide service to AT&T, goodwill costs, and customer service cancellations, including possible cancellations of other services such as cable, wireless, toll and cable modem. AT&T argues it is not possible to quantify CLEC damages.

Commission preliminary finding: No finding or comment is necessary.

3. Preclusion of other CLEC remedies. Sections 13.5 and 13.6 of the QPAP treat Tier 1 payments as liquidated damages which are designed to provide an exclusive remedy to compensate CLECs for damages resulting from Qwest's poor service. In return for the right to such payments without having to prove harm, Qwest would secure the assurance that other damages arising from the same performance will be waived. Qwest also asserts that the offset provision of the QPAP (Section 13.7) would apply to non-contractual remedies. CLECs disagree, arguing they should not be foreclosed from seeking other remedies. Qwest's reply brief commits to not preclude non-contractual legal and regulatory claims, but Antonuk finds Sections 13.5 and 13.6 unclear and inconsistent when taken together. Antonuk adds that the same need exists to ensure that from any such recovery there is deducted in one way or another the contract damages amount for which the QPAP should provide. To remedy the inconsistency, and to make clear that the QPAP allows CLECs to recover noncontractual damages, Antonuk strikes most of Section 13.6, replacing the stricken language with a provision requiring a CLEC to elect either (a) the remedies otherwise available by law, or (b) those available under the QPAP and other remedies as limited by the QPAP. Thus, CLECs may select all or none of the QPAP remedies. CLECs electing QPAP

remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

Qwest comments

Qwest does not oppose Antonuk's preclusion of other CLEC remedies and asserts that its modified QPAP (13.6) incorporates Antonuk's "three-factor" test concerning alternative remedies. Qwest, however, modifies the QPAP further to clarify that payments under PSC rules and orders will be considered contractual. Qwest's clarifications assume that PSC rules and orders regarding wholesale service quality issues are also contractual as they relate to interconnection agreements.

AT&T comments

AT&T strenuously objects to Antonuk's recommended revisions as providing Qwest the ability to put CLECs out of business without fear of significant financial harm to itself. AT&T disagrees with Antonuk's findings that restrict CLEC remedies to only those available under the QPAP. AT&T argues that Antonuk's position is legally inappropriate and raises public policy concerns. AT&T claims that, if Antonuk's approach is adopted, alternative CLEC remedies for damages are essentially eliminated in a way never contemplated by the FCC or any other state commissions. AT&T proposes instead the findings of the Colorado PUC regarding remedies, which allow CLECs the ability to sue to recover extraordinary losses due to Qwest's poor performance. AT&T recommends the Commission adopt the Colorado commission's language regarding preclusion of CLEC remedies (CPAP 16.6).

Covad comments

Covad asserts Antonuk's conclusions are fatally flawed as they ignore the fact the QPAP will be incorporated into the SGAT as well as the fact that damages not

compensated under the QPAP should be recoverable. Covad recommends rejecting his conclusions and accepting the Colorado PUC's approach. That approach finds, in part, that concerns about backsliding justify the risk that Qwest may overcompensate CLECs on occasions for damages while preserving the rights of CLECs to sue when under compensated. In turn, the Colorado PUC finds appropriate a provision that permits the assertion of "contractual theories of relief" where extraordinary losses are sustained as a result of Qwest's poor service quality.

Commission preliminary finding: The Commission rejects as unreasonable Antonuk's recommendation, which would preclude CLECs opting into the QPAP from seeking other remedies when they sustain extraordinary losses as a result of Qwest's noncompliant performance. The Commission adopts the recommendation of AT&T and Covad and directs Qwest to replace the third and final sentence of Montana QPAP Section 13.6 (11/6/2001 version) with the following slightly revised language recommended by the Colorado PUC at CPAP section 16.6:

Tier 1 payments are in the nature of liquidated damages. Before a CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the QPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in SGAT Section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the QPAP, no such procedural requirement shall apply.

The Commission agrees with Antonuk's finding that CLECs electing QPAP remedies are not precluded from seeking recovery under noncontractual theories of liability those parts of damages that are not recoverable under contractual theories of liability (e.g., federal enforcement under 271(d)(6), antitrust, tort and consumer protection remedies).

4. Indemnity for CLEC payments under state service quality standards.

Antonuk rejects AT&T's proposal that Qwest compensate CLECs for any payments they must make for failure to meet state or federal service quality rules, provided that Qwest wholesale service deficiencies cause CLEC failures. This issue was addressed in prior workshops (indemnity for CLEC payments under state service quality standards) where such indemnification was similarly rejected.

5. Offset provision (Section 13.7) AT&T objects to Qwest's provision that allows it to reduce damages a court or regulatory agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC, if the damages are based on the "same or analogous" wholesale performance. As regards the issue of Qwest's right to an offset, Antonuk finds that this issue is really about where to resolve disputes that concern offsets. He finds the QPAP dispute resolution process to provide parties an opportunity to challenge any Qwest decision to reduce QPAP payments under the offset language. He includes in the QPAP a provision for interest on awards so that Qwest does not have a time-value-of-money advantage while resolving disputes. As regards disputes about the "same or analogous performance" provision, he finds the Qwest revised language generally appropriate as it limits the offset provisions to the portion of damages that represent compensatory recovery by CLECs. In finding the term "analogous" too vague he prefers the phrase "same underlying activity or omission for which Tier 1 assessments are made under this QPAP." While the QPAP has nothing to do with compensation for physical property or personal injury damages, to preserve the effect of other SGAT provisions that do, he revises Section 13.7 to prohibit

offsets against CLEC payments that relate to third-party physical damage to property or personal injury.

Qwest comments

Qwest incorporates into the QPAP (13.7) changes Antonuk recommends.

AT&T comments

AT&T agrees that CLECs are not entitled to double recovery for the same damages. However, AT&T claims that the offset issue is one that should be argued in court if a CLEC decides to sue in order to recover alleged losses and that the issue should be decided by the finder of fact in that forum. AT&T points out that neither the Texas nor Colorado performance assurance plans include provisions such as this one that allows Qwest to offset payments won by CLECs using alternative remedies. AT&T notes that Qwest will have the opportunity to argue the appropriateness of offset in court. AT&T rejects Antonuk's reasoning that Qwest is not actually able to use this provision to offset legal judgments obtained against Qwest by a CLEC because the CLEC is free to use the dispute resolution procedure in the SGAT to pursue its claim in front of the state commission. AT&T recommends the Commission reject Antonuk's finding regarding the offset provision and instead adopt the offset language of the Texas or Colorado commissions, or that recommended by the Utah Staff.

Covad comments

Covad asserts that while Antonuk foists the responsibility and cost to determine the appropriateness of offsets onto CLECs, Covad prefers having the entity (PSC or court) that renders damage awards to make offset decisions.

Commission preliminary finding: The Commission rejects Antonuk's recommendation that permits Qwest to offset damages a court or other agency orders it to pay a CLEC by the amount of QPAP payments to that CLEC when the damages are based on the same wholesale performance.

The Commission does not believe double recovery by a CLEC for the same poor performance is proper, but finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or adjudicatory body that awarded the damages to the CLEC. Similarly, that entity will also decide whether the performance at issue is the same performance as that which was compensated under the QPAP. Qwest is directed to replace the first two sentences of QPAP Section 13.7 (11/6/2001 version) with the following Colorado CPAP recommended language:

If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payments under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.

The Commission agrees with Antonuk's reasoning that prohibits offsets against CLEC payments related to third-party physical damages or personal injury. Therefore, no change to the final sentence of QPAP Section 13.7 is necessary.

6. Exclusions (Section 13.3).

This section of the QPAP lists cases that excuse Qwest from Tier 1 and Tier 2 payments. Antonuk's *Report* discusses six such exclusions.

- a. Bad faith. Antonuk finds this exclusion should stay in the QPAP because CLECs should not receive QPAP payments as a result of their manipulative conduct. However, he adds a provision to Section 13.3 so that Qwest does not use this exclusion to excuse its own failure to deliver performance it should reasonably be expected to provide just because the CLEC knows of Qwest's weakness.

- b. Duplicative force majeure provisions. Given that the SGAT provides for service obligations, Antonuk rejects Qwest's argument that the QPAP requires its own separate and different force majeure provision.
- c. Resolving disputes over force majeure events. Antonuk agrees with Qwest's view that the PSC resolve disputes of whether force majeure events occurred. The QPAP should require Qwest to notify the PSC of its force majeure claims within 72 hours of learning of them, or after it reasonably should have learned of them.
- d. Nexus between force majeure events and Qwest performance. Antonuk accepts the QPAP's existing language, but recommends adding AT&T's language specifying the method for calculating the impact of a force majeure event on interval measures (and payments). Qwest's burden will be to not only show a force majeure event occurred, but to demonstrate its relation to failed performance.
- e. Applicability of force majeure to parity measures. Antonuk finds that parity performance measures should not be subject to force majeure payment exclusions.
- f. CLEC forecast exclusion. Antonuk finds the language of this provision is too broad and he recommends limiting the exclusion to failure to provide forecasts that are "explicitly required by the SGAT." He does not allow forecast exclusions stemming from state rules.

Qwest comments

Qwest states to incorporate language into the QPAP (see 13.3.2 and 13.3) in accordance with all of Antonuk's findings regarding exclusions.

7. SGAT limitation of liability to total amounts charged to CLECs. Antonuk finds that the payments referred to in SGAT Section 5.8.1 and in the QPAP are mutually exclusive: Qwest's liability for property damage and personal injury should not be limited by QPAP payments, and vice versa. He recommends that Section 5.8.1 should be revised to include this provision: "payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section."

Qwest comments

Qwest states to have revised the QPAP and adds that it will file to revise the SGAT (5.8.1).

D. Incentive to perform.

1. Tier 2 payment use (Section 7.5). AT&T would eliminate the section that requires using Tier 2 payments for purposes that relate to the Qwest service territory. Antonuk prefers language that allows a PSC to direct the use of the money, within the limits of state law. He also recommends that the QPAP include a funding mechanism to first use Tier 2 payments to support state commission activities that relate to wholesale telecom service issues, but also to use a portion of Tier 1 payments, if necessary, to support those activities. This mechanism operates as follows: 1/3 of Tier 2 payments and 1/5 of Tier 1 escalation payments would go to the fund for the states that participate in a multistate administration effort for (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecom service activities that the participating PUCs decide are best carried out on a multistate basis. Any unused Tier 1 payments would be returned to CLECs who made them, on a prorated basis, at least every two years. To fund the activities on an interim basis Antonuk would require Qwest to make an advance payment against future Tier 2 obligations.

Qwest comments

Qwest modifies QPAP (7.5) and further clarifies that it will pay Tier 2 funds unless the Commission directs it to deposit the funds into "another source provided for under state law." However, Qwest adds it will make such payments provided the Commission identifies a state fund that exists by the time Tier 2 payments are due under the QPAP. Otherwise, Qwest will make deposits to the state's general fund. Also, in regard to Tier 2 payment use, Qwest includes four new QPAP sections (11.3, 11.3.1, 11.3.2 and 11.3.3) to establish the source and use of a funds set aside for the "Special Fund." Somewhat ambiguously, Qwest adds that "At least initially, the participating states are those which provide a positive recommendation based on the attached QPAP." Qwest asserts it is necessary for Commissions to pre-designate individuals the Commission authorizes to disburse such funds for legitimate purposes (QPAP section 15.0).

AT&T comments

AT&T objects to Antonuk's proposal that 1/5th of CLECs' Tier 1 escalation payments be used to support a fund for multistate oversight of the QPAP. AT&T argues the proposal is inappropriate because it was not discussed by the participants in this proceeding and because CLECs already pay state taxes and regulatory fees to support regulatory commissions, and should not be expected to remit to the states a portion of their payments for poor service.

Covad comments

Covad would constrain PSC uses to exclude ones that benefit Qwest. Covad finds it "incongruous" to compel Qwest's payments to be used for purposes by which it benefits and may, in fact, create a perverse incentive on the part of Qwest to provide wholesale service to CLECs.

Commission preliminary finding: The Commission rejects Antonuk's proposal to divert a portion of CLECs' Tier 1 escalation payments to a fund to be used by the Commission in its efforts regarding QPAP oversight and wholesale service quality. The Commission intends at this time to fund its

QPAP oversight activities through the use of Tier 2 payments. If Tier 2 payments prove to be insufficient to cover the cost of QPAP oversight, the Commission reserves the right to revisit this issue.

The Commission supports Antonuk's recommendation that Montana and other state commissions in Qwest's service area join together to participate in a multistate QPAP oversight effort. The Commission will contact other state commissions to determine their interest and, if there is interest, will work with those states to develop a plan for going forward with this proposal.

Regarding the use of Tier 2 funds, the Commission agrees with Antonuk's recommendation that the QPAP include a provision that allows the Commission to direct the use of Tier 2 payments, within the limits of state law. In keeping with this finding, the Commission directs Qwest to keep the first sentence of QPAP Section 7.5 as it appears in the 11/6/2001 version of the QPAP, but to delete the remainder of this provision.

2. 3-month trigger for Tier 2 payments. Antonuk finds that in any 12-month rolling period in which there occurs two non-compliant months out of any consecutive three months, payments for Tier 2 measures without a Tier 1 obligation should begin after one more month of noncompliance, with escalation as laid out in the QPAP. In the case of Tier 2 measures that are also Tier 1, the Tier 2 payments will begin in the second consecutive month of noncompliance, provided that the same "two-out-of-three month condition" is met.

Qwest comments

Qwest agrees to incorporate Antonuk's changes to the QPAP (9.1.2).

AT&T comments

AT&T requests clarification of Antonuk's recommendation here because, as AT&T interprets the QPAP, there is no provision for escalation of Tier 2 payments.

Commission preliminary finding: Like AT&T, the Commission does not find a provision in the QPAP for escalation of Tier 2 payments to the states. The Commission otherwise concurs with Antonuk's recommendation. Participants are invited to provide the Commission with any clarifying information.

3. Limiting escalation to 6 months. Qwest favors limiting escalation to six months while CLECs (AT&T, ELI/Time Warner/XO Utah, WorldCom, Z-Tel, and Covad) and the New Mexico Advocacy would not limit escalation. Antonuk rejects the CLECs' and New Mexico Advocacy staff's proposal for several reasons. First, he asserts it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation. He adds that many of the measures at issue are not parity measures but rather benchmark measures and this record does not demonstrate with certainty that those levels of performance can be met and sustained at any cost within the realm of economic reason. However, they generally relate to services about which little experience existed when the measures were adopted. Thus, the correlation between long-term non-compliance and insufficiency of inducements is not self evident as some have argued. If non-compliance continues for six months in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark. Second, parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise. Third, calculated comparisons of the marginal costs of compliance versus non-compliance are not the only reason problems can persist. Antonuk finds the logic

of extended escalation to depend profoundly upon the certainty of propositions like these. He finds it speculative to conclude that insufficiently increasing payments, as opposed to other factors, such as: (a) a less than optimally crafted standard, (b) a series of extenuating external circumstances, (c) buyer efforts to induce failure, (d) management's performance decisions and actions (that may have been soundly believed sufficient to improve performance, but proven inadequate only as time passed), or even other reasons, cause or contribute to a failure to provide compliant performance.

Antonuk concludes that if it can be shown that six months of escalation creates payment levels judged to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then a six-month cutoff of escalation is reasonable. This conclusion is appropriate in light of three other factors: (1) there are provisions for root cause analysis of continuing problems; (2) there exists the option of ending 271 authorization where that measure is shown to be appropriate to the circumstances and (3) there exists the ability under non-271 sources of regulatory authority to examine the causes and consequences of structural failures or weaknesses in the facilities, management, systems, processes, activities, or resources by which regulated providers of utility services, such as Qwest, satisfy their service obligations.

AT&T comments

AT&T disagrees with Antonuk's finding and points out that both the Colorado commission and the Utah Staff rejected limits on payment escalation. AT&T claims that Qwest's argument that unlimited payment escalation would overcompensate CLECs misses the point because the purpose of payment escalation is to balance CLEC compensation for their losses and to ensure the penalty is higher than the amount Qwest is willing to absorb as a cost of doing business. AT&T cited the Colorado commission's reasoning that continuing escalation of payments for continuous poor performance should help prevent the

possibility that Qwest might evaluate whether it would rather absorb QPAP penalties and deter competition or avoid penalties and comply with the law.

Covad comments

Covad finds Antonuk's criticisms of CLECs for speculating inconsistent with his speculation that poor performance beyond six months is beyond Qwest's control. Covad reasons that because military-style testing demonstrates Qwest's ability to meet all PIDs prior to interLATA relief, Qwest should not be able argue, as Antonuk reasons, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to 6 months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad notes the Colorado Commission's Special Master's Final Report that requires escalation beyond six months and recommends adopting such an approach.

Commission preliminary finding: The Commission rejects Antonuk's recommendation for a six-month limitation on Tier 1 payment escalation for the reasons identified by AT&T and Covad: (1) to deter Qwest from providing poor service to CLECs for extended periods of time; and (2) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business. Participants are invited to propose changes to QPAP Section 6.2.2 (and Table 2 therein) to reflect the escalation increments for noncompliant months after the 6th month.

4. Splitting Tier 2 payments between CLECs and the states. Because it was not done in the Colorado PAP as Covad asserts, and no other 271 PAP approved by the FCC does so, Antonuk rejects Covad's proposal to divide Tier 2 payments between the states and CLECs. Antonuk finds that Tier 1 payments already provide adequate compensation to CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure selection process. Antonuk explains how the Performance Indicator Definitions (PIDs) were developed and how they are incorporated into the QPAP.

B. Adding measures to the payment structure.

1. Requiring payments for cancelled orders. Antonuk rejects the CLECs' proposal that the QPAP should provide for payments when CLEC customers cancel orders after Qwest misses a due date.

2. Requiring payments for "diagnostic" PIDs. Antonuk finds that EELs, line sharing and sub-loops should be included in the QPAP payment structure as soon as practicable. He notes that firm benchmarks or parity standards will have to be adopted first.

Covad comments

Covad asserts the Report's conclusion should be revised to provide that when PIDs convert from being diagnostic to either a benchmark or a parity standard that the QPAP will include them as of the date Section 271 relief is granted.

Commission preliminary finding: The Commission concurs with Antonuk's resolution and only adds that its recent emerging services final report on line sharing and subloop unbundling expresses the same view. Line sharing now has a penalty provision. Additionally, the Commission agrees with Covad that PIDs that are currently labeled "diagnostic" be included in the QPAP as soon as they are converted to benchmark or parity standards.

3. Cooperative testing. Antonuk rejects Covad's proposal for a cooperative testing performance measure that minimizes CLEC trouble reports for xDSL UNE

loops they order from Qwest. (Covad said Qwest has not complied with its agreement to perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases; cooperative testing would turn up defective loops before Covad has to submit trouble reports to Qwest after installation.) Antonuk said Covad should raise the issue in whatever forum is created to identify, discuss and resolve performance measure issues.

4. Adding a new PID -- PO-15D -- to address due date changes. Antonuk rejects this Covad proposal because Covad did not propose a standard for this currently diagnostic measure and, therefore, there is no basis for payment calculation under the QPAP.

5. Including PO-1C preorder inquiry timeouts in Tier 1. Antonuk rejects this AT&T proposal because the QPAP already provides compensation for preorder response time measures, that Antonuk believes is adequate for now. He finds that, if the ROC-OSS test finds a large enough number of timeouts to cause concern about the impact on the preorder response times, then the issue should be revisited.

6. Adding change management measures. Antonuk finds it appropriate to add the two change management measures that Qwest agreed to include in the QPAP (GA-7, timely outage resolution, and PO-16, release notifications). They are diagnostic now and after benchmarks are established by the ROC-OSS collaborative they will be added as "high" Tier 2 measurements.

7. Adding a software release quality measure. Antonuk recommends that WorldCom's proposed RQ-3 PID, that measures the quality of Qwest's software releases by determining the number of releases that require amendment, suspension or retraction within 14 days of implementation, be considered for inclusion on the agenda for the first 6-month review of the QPAP.

8. Adding a test bed measurement. As it is a measure under development Antonuk finds it premature to decide whether WorldCom's proposed PO-19 (test environment responsiveness) should be included in the QPAP.
 9. Adding a missing-status-notice measure. Antonuk rejects WorldCom's proposal to add a performance measure to track missing status notices in anticipation of Qwest experiencing a problem (like Verizon did in NY) of failing to provide these notices.
- C. Aggregating the PO-1A (pre-order IMA-GUI response times) and PO-1B (pre-order EDI response times) performance measures. Antonuk agrees with Qwest that an agreement was reached in the PEPP collaborative to collapse the 7 individual transaction measurements contained in each of these PIDs into two for purposes of the QPAP, and he supports that agreement.
- D. Measure weighting.
1. Changing measure weights. Antonuk recommends adopting the measure weighting initially proposed in the QPAP and not adopting either the weighting increases sought by CLECs for certain "high-value" services (collocation, LIS trunks, UDIT, unbundled loops, resold DS-1 and DS-3) or the weighting decreases Qwest sought in return (residence & business resale, 2-wire loops, analog loops).
 2. Eliminating low weighting. Antonuk rejects CLECs' proposals to eliminate the "low" weighting designation altogether.
 3. LIS trunks weighting. Antonuk rejects AT&T's proposal to increase the weighting of LIS trunk measures.

Qwest comments

Qwest's comments summarize the content of Antonuk's Report and proffer no changes on measure weights.

E. Collocation payment amounts.

As evidence demonstrates that Qwest accepts the proposal proffered by the CLECs in the ROC-PEPP collaborative and that the proposal reflects the Michigan approach in regard to collocation payments, Antonuk rejects the New Mexico Staff's suggestion that the QPAP reflect either the Michigan or Georgia approach to determining collocation payment amounts. The incorporation of this proposal in the QPAP responds to the New Mexico Staff's concern.

Qwest comments

Qwest incorporates the "days late" collocation payment proposal into the QPAP (at 6.3).

F. Including special access circuits.

WorldCom requests inclusion of special access circuits in the performance measures while ELI/Time Warner/Xo considered payments important due to CLEC use of special access to provide local exchange service. Qwest asserts there is agreement by the ROC-OSS collaborative to drop special access circuits from discussions. Because the evidence demonstrates that most special access circuits at issue here were provided under Qwest's interstate FCC tariffs, Antonuk concludes that such circuits do not merit QPAP inclusion as PID performance measures as requested by ELI/Time Warner/XO Utah and WorldCom. Unless inappropriate barriers exist and that have the practical effect of requiring tariff purchases where interconnection purchases should be available, Antonuk reasons that the FCC should address failures to meet tariff requirements.

WorldCom comments

WorldCom asserts that Antonuk's Report errs in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, CLECs should seek remedies at the FCC. WorldCom asserts that because the FCC has long held it will consider discriminatory and anticompetitive RBOC conduct as part of the public interest test states should address such alleged conduct as part of 271 authority that addresses backsliding; this may occur concurrent with FCC efforts. WorldCom adds that inclusion of special access is under consideration in Texas. WorldCom also notes, that only 10 percent of traversing traffic need be interstate for a CLEC to order federally tariffed special access. WorldCom adds that the New York PSC found special access services critical to business in their state. WorldCom mentions how other states' actions consider special access in performance reporting. As for service quality, there is no federal-state conflict, there are no federal service quality standards and neither Congress nor the FCC has taken regulatory actions on "intrastate access" service quality. WorldCom concludes that it is appropriate for the Commission to approve reasonable performance measures for special access.

Commission preliminary finding: Based on WorldCom's comments, the Commission finds that it is premature to make a preliminary decision based on Antonuk's Report and WorldCom's comments. Instead, merit exists in receiving comments on WorldCom's suggestions and on Colorado's recent resolution. The Commission invites comment on how the Colorado Commission resolved the same issue (see Colorado Commission, Decision No. R01-997-I, Docket No. 01I-041T, Issue No. 54, Issues September 26, 2001, at pages 79-82), and why that resolution is not relevant here. Comments should also address the relevance of FCC-regulated special access rates vis-à-vis this Commission's deregulation of special access except for IXC facilities connecting a POP and an ILEC's CO.

G. Proper measure of UNE intervals.

Antonuk rejects Covad's argument to base QPAP payments on the service intervals of SGAT Exhibit C (the standard interval guide) instead of the PID-established intervals. His rejection stems from his finding that there is, as was discussed in the UNE workshop, consistency between the PID and Exhibit C.

H. Insufficient compensation for low-volume CLECs.

Antonuk rejects Covad's argument that the QPAP's design primarily compensates high-volume CLECs at the expense of low-volume ones. He finds that Qwest provides credible and un rebutted evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Second, in regards to Covad's objection to the QPAP provision that gives Qwest a "free miss" each month in the case of CLEC's with small order volumes, Antonuk also finds that a yearly rolling average will correct the "rounding down" problem of this provision; however, as a yearly rolling average does not solve the issue of escalating payments for consecutive-month misses, escalation that applies in any month where any miss occurs for low-volume CLECs where the annual calculation shows Qwest violated the applicable requirement will solve that problem. He concludes that the QPAP should incorporate these changes.

Qwest comments

Qwest implements the Antonuk's decision into the QPAP (Section 2.4) but makes minor adjustments to Antonuk's calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100% performance result would be required to meet the standard. Whereas Antonuk concludes that Qwest use 12 months of performance results to determine if the miss in the current month should be counted, Qwest seeks to clarify the language such that it will use the current month's results, plus a sufficient number of prior consecutive month's performance data so that a 100% performance result would not be required to meet the standard.

Commission preliminary finding: The Commission invites comment on the language submitted by Qwest as described above.

III. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

A. 6-month plan review limitations (Section 16).

The QPAP (Section 16) provides for the occasions when the QPAP may be amended. Antonuk finds Qwest's QPAP to limit reviews similarly to how the Texas PAP and the Colorado PAP limits reviews. AT&T had noted that the New York and Texas plans allow any aspect to be examined at six-month intervals and urged the same in consideration of the public interest. Qwest objects to opening the QPAP generally to amendments. Antonuk reviews what revisions the Colorado Special Master's Report allows at 6 month and at 3 year intervals. The purpose of the latter review is to determine the PAP's effectiveness at "inducing compliant performance." He finds this process should be adopted (*Report*, p. 61). Antonuk reasons that due to uncertainty on the continued role of the ROC in performance measure development and administration, the Texas arbitration provision is therefore appropriate to assure that the QPAP meets the applicable standards without unduly exposing Qwest to indeterminate increases in its financial exposure. He also recommends three changes to the QPAP review section:

1. Instead of allowing Qwest to veto recommendations, provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding the addition of new measures to the QPAP payment structure.
2. Recognize and support multi-state efforts (should they occur) to create a Tier 2-funded method and an administrative structure for resolving QPAP disputes.
3. Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the

degree to which there are adequate assurances that Qwest's local exchange markets remain open.

Qwest comments

Qwest adds language to the QPAP (16.1) to allow arbitration to resolve disputes over the addition of new measures arising out of the six-month review; this is as provided for in the SGAT. Qwest amends the QPAP to allow six-month reviews to be conducted collaboratively (16.1). As Antonuk's Report recommends a two-year review, Qwest amends the QPAP (16.2) to read in part: "Two years after the effective date of the first FCC 271 approval of the PAP, the participating Commissions may conduct a joint review by a independent third party to examine the continuing effectiveness of the PAP as a means of inducing compliant performance."

AT&T comments

AT&T claims Antonuk did not provide a definitive solution to the issue of who controls the 6-month review process. AT&T objects to the existing 6-month review provisions that give Qwest control over whether any changes will be made or even addressed. AT&T seeks instead to shift control of the 6-month review process away from Qwest and recommends the approaches of the Colorado commission and of Utah Staff, both of which clearly provide that the state commission is the decision-maker when it comes to QPAP changes being addressed in the 6-month review process.

The MCC agrees with a two-year review cycle over the long term but if performance measures and penalties are to be updated successfully, MCC prefers an annual review for each of the first three years of the PAP and a thorough review upon three years' effectiveness.

Commission preliminary finding: The QPAP calls for reviews every six months for the purposes of determining: (1) whether performance measurements should be added, deleted or modified; (2) whether to change benchmark standards to parity standards; and whether to modify the weighting and/or tiers assigned to

measurements. A major review by an independent third party of the continuing effectiveness of the QPAP is scheduled for two years after the QPAP takes effect. In addition, there is a provision that provides that the QPAP will be available to CLECs until Qwest eliminates its Section 272 affiliate, at which time the Commission and Qwest will review the continuing necessity of the QPAP. The same provision calls for the QPAP to be rescinded if Qwest exits the interLATA market. The Commission addresses each of Antonuk's recommendations for changes to the QPAP review section below:

Limitations on reviews (Section 16.1): Antonuk approves the Qwest QPAP language regarding limitations of the 6-month reviews to performance-measure related issues. The Commission generally agrees with Antonuk's recommendation, but finds the Commission should retain the discretion to add other topics related to performance measurements and criteria for measurement reclassification to the 6-month reviews just in case it becomes necessary to respond to circumstances that may arise as experience is gained with the operation of the QPAP. The Commission directs Qwest to revise Section 16.1 to add the following provision to this section:

The Commission retains the right to add topics and criteria other than those specifically listed here.

Dispute resolution (Section 16.1): Antonuk recommended turning to the SGAT dispute resolution procedure at SGAT section 5.18.3 when parties participating in the 6-month review cannot agree whether new performance measures should be added to the QPAP. The SGAT dispute resolution procedure focuses on the use of formal arbitration to settle disputes. Antonuk's reasoning for this recommendation centered on the uncertainty of a continued role in performance measure administration by the Regional Oversight Committee acting on behalf of the state commissions. Antonuk preferred, and proposed, that state commissions set up a joint, multistate dispute resolution process. The Commission supports the recommendation that a multistate process be established and funded and will work toward that end. However, underlying this support for a multistate dispute

resolution process is the Commission's finding that it is the Commission's responsibility to ensure the effectiveness of the QPAP and to resolve disputes arising out of it. For that reason, the Commission rejects Antonuk's recommendation that disputes resulting from the QPAP review process be handled pursuant to the SGAT dispute resolution procedure. Rather, unless and until a multistate dispute resolution process is established, the Commission finds that the Commission will resolve disputes arising out of the QPAP reviews.

Biennial reviews of the QPAP: Antonuk recommended the Commission review the QPAP's continuing effectiveness every two years instead of after three years. MCC recommended an annual review in order to update performance measurements and penalties, with a thorough review after three years. The Commission adopts Antonuk's recommendation for a thorough review every two years because the 6-month reviews will provide sufficient opportunity to address MCC's concern regarding updates related to performance measurements.

Other issues in Section 16 not addressed by Antonuk:

References to multistate reviews: The language in the 11/6/2001 version of the QPAP (Section 16.1) refers to multistate joint QPAP reviews. Because it is not known at this time whether such a multistate process will be established, the Commission finds the language should be revised to refer only to this Commission. A new provision should be added to state that nothing in the QPAP prohibits the Commission from joining a multistate effort to conduct QPAP reviews and developing a process whereby the multistate group would have the authority to act on the Commission's behalf.

Initial 6-month review: The first sentence of Section 16.1 provides that the first 6-month review will occur six months after Qwest obtains Section 271 approval from the FCC for the one of the nine states that participated in the multistate QPAP workshops. This language appears to contemplate a multistate review process that

is not yet in place. The Commission finds this language should be modified to provide for the first 6-month review to occur six months after the date Qwest obtains Section 271 approval from the FCC in Montana, unless the Commission agrees to a different date as a result of establishment of a multistate QPAP review process.

Qwest's agreement to changes: Section 16.1 continues to require that Qwest agree to any QPAP changes, except for the addition of new performance measures where disputes will be resolved elsewhere. Antonuk seemed to reject that position and Qwest indicated in its comments it had incorporated Antonuk's findings. The Commission finds that QPAP changes are subject to Commission approval and do not require Qwest's agreement.

B. Monthly payment caps (Section 13.9).

Antonuk agrees with CLECs that Qwest should not be allowed to place Tier 1 payments, that exceed a monthly cap, into escrow and found there is no basis to relieve Qwest of its obligation to pay amounts up to the annual cap.

C. Sticky duration (permanently freezing base QPAP payments at an escalated level).

Antonuk rejects Z-Tel's proposal for sticky duration as inappropriate, disingenuous, and draconian.

D. Low volume critical values.

Antonuk rejects Z-Tel's and WorldCom's proposal to apply the lower critical value of 1.04 to all low volume measures and not just the subset of them that was agreed to by compromise of most of the parties in the PEPP collaborative. (The PEPP agreement had

decreased the default critical value from 1.65 to 1.04 for certain low-volume measures and increased it to varying levels above 1.65 for progressively larger volume measures.)

E. Applying the 1.04 critical value to 4-wire loops.

Antonuk rejects AT&T's inclusion of assertion that 4-wire loops were supposed to be included as part of the 1.04 critical value compromise in the PEPP collaborative. He finds insufficient evidence to support AT&T's argument or to conclude that there is a very high rate of use of 4-wire loops for delivering high-value services; however, he finds that if, during a QPAP review proceeding, there is evidence that more than 75% of 4-wire loops are used for high-value services, the issue should be reconsidered.

F. Measures related to low-volume, developing markets (Section 10).

Antonuk rejects Z-Tel's proposal to replace the \$5,000 per month aggregate payment to all CLECs with a minimum payment of \$1,000 to individual CLECs for individual measures. (The QPAP provides for minimum payments of at least \$5000 per month for noncompliant service in cases where aggregate CLEC volumes range between 11 and 99 orders.) Antonuk also rejects Covad's suggestion that all xDSL products be included in this higher-payment scheme for low-volume, developing markets.

G. Minimum payments.

Antonuk revises the QPAP to require annual payments to CLECs of \$2,000 for each month in the year in which Qwest missed any measure applicable to low-order-volume CLECs (annual order volume of 1200 or less), less what was paid in QPAP payments to such CLEC. (For example, if Qwest paid a qualifying CLEC \$5,000 in QPAP payments, but there were 9 months in the year in which Qwest failed to meet a Tier 1 measure for that CLEC, the added amount that Qwest must pay at the end of the year to that CLEC would be $9 \times \$2,000 - \$5,000 = \$13,000$.) Antonuk concludes that minimum payments

should not be applied on a per measure basis. His proposed minimum payment calculation must be performed at the end of each year.

Qwest comments

Although Qwest vigorously disagrees with the need for any additional payment opportunities for small CLECs it agrees to Antonuk's making an annual minimum payment based on the number of months in which Qwest fails to meet performance standards and revises the QPAP (6.4) accordingly.

Commission preliminary finding: The Commission seeks comment on Qwest's revisions to the QPAP.

H. 100% caps for interval measures.

Antonuk rejects CLEC proposals to eliminate the QPAP provisions that cap payments at 100% on interval measures. (For example, a 3-day actual average interval for 100 events that are subject to a 2-day interval would produce a miss of 150%, but under the QPAP, the miss would be capped at 100%.)

AT&T comments

AT&T claims that Antonuk misunderstood the CLEC position on this issue as being that the per-occurrence scheme when applied to interval measurements should measure the number of individual misses and then assign a severity level to each miss. Based on this misunderstanding, according to AT&T, Antonuk then criticizes the CLECs for their failure to provide evidence about the number and severity of Qwest misses on interval measures. AT&T agrees with Z-Tel's argument that it is inappropriate to try to introduce the number of misses into an interval measure that does not use the number of misses to measure performance, but instead relies on the time interval taken by Qwest to provide service. AT&T comments that CLECs and Qwest all recognize that very poor Qwest performance to CLECs and the use of the per-occurrence QPAP scheme can result in the number of payment occurrences exceeding the number of CLEC orders in a month.

AT&T states the issue is whether the payment occurrences should be capped at the number of CLEC orders. Qwest says they should, because it would not make sense to pay CLECs on more orders than they actually submitted in a month. AT&T says no, because the worse Qwest's performance is, the more Qwest should pay. AT&T reiterates its argument that the 100% cap on interval measures protects Qwest against its own poor performance to CLECs.

Commission preliminary finding: The Commission adopts Antonuk's recommendation.

I. Assigning severity levels to percent measures.

Antonuk rejects Z-Tel's proposed payment formula that bases QPAP compensation on percent measures more proportional to the relative size of the "miss" involved. He found Qwest's QPAP adequate for now, but notes proposals like this one could be addressed fully in future QPAP review and amendments proceedings.

IV. SELF-EXECUTING MECHANISM

A. Dispute resolution (Section 18).

Antonuk rejects Qwest's proposal to add a dispute resolution provision specifically applicable to the QPAP that applies the general SGAT dispute resolution provisions to disputes arising only under certain QPAP sections. He found that the general SGAT dispute resolution sections apply as well to the QPAP section of the SGAT.

Qwest comments

Qwest states to incorporate Antonuk's recommended dispute resolution language into the QPAP (6.4).

Commission preliminary finding: Antonuk recommends, and Qwest has implemented, language that requires use of the SGAT dispute resolution procedure at section 5.18, which focuses on formal arbitration, to resolve disputes over the meaning of QPAP provisions and how they should be applied. The Commission rejects this recommendation because it is the Commission's responsibility to oversee and administer the operation of the QPAP. Therefore, dispute resolution concerning the meaning and application of QPAP provisions appropriately reside with the Commission.

B. Payment of interest.

Antonuk finds that the QPAP should provide for interest on late QPAP payments at the prime rate published daily.

Qwest comments

Qwest includes in the QPAP (11.1) the use of the "prime rate" to reflect the time value of money.

AT&T comments

AT&T recommends that the interest rate on late payments be whatever was set by the state commission in a Qwest rate case. (In the last Qwest general rate case, Docket 88.12.15, Order 5398a, the Montana PSC set Qwest's rate of return on equity at 12%.)

Commission preliminary finding: The Commission finds Antonuk's recommendation to be reasonable and adopts it.

C. Escrowed payments.

Antonuk includes in the QPAP provisions for one party to the QPAP to require the other party to make payments into escrow where the requesting party can show cause, perhaps

on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty.

D. Effective dates.

1. Initial effective date. Antonuk agrees with Qwest that the QPAP effective date should be when Qwest gains 271 entry approval in a state and he revises the QPAP to require Qwest to provide monthly QPAP reports as if the QPAP became effective on October 1, 2001.

Qwest comments

Qwest is unopposed to providing reports for information reasons, but it finds unnecessarily complicated the requirement that it report information as if the QPAP were effective on October 1, 2001. Since no CLEC has opted into the QPAP, Qwest intends to provide Tier 2 reports and aggregate Tier 1 reports to Commissions and parties in this QPAP proceeding beginning with November 2001 payment reports and continuing until Qwest gains (271) approval from "the state."

AT&T comments

AT&T changes its position from the workshops, where it argued for implementation of the QPAP upon approval by the state commission, to agreement with the Utah Staff which has recommended QPAP implementation at the time Qwest files its Section 271 application at the FCC.

MCC comments

Just as the Colorado hearing examiner recommends effectiveness after 271 authority but that Qwest be required to generate "mock reports" in the interim for PUC staff review, the MCC holds that while the Report fails to mention when to implement the plan it should be immediate.

Commission preliminary finding: The Commission agrees with Antonuk's recommendation that the QPAP become effective on the date Qwest's application for 271 approval in Montana is approved by the FCC, but that Qwest immediately begin filing with the Commission and CLECs monthly "mock reports," with no monetary penalties attached, as if the QPAP (reflecting this Commission's findings) was in operation now. In this way, the Commission and CLECs will gain useful information about the operation of the QPAP prior to its actual implementation.

2. "Memory" at effective date. Antonuk rejects AT&T's proposal that when the QPAP becomes effective, Qwest should begin payments as if it had been in effect since the PSC action to approve it. As for his reasoning, Antonuk adds that the very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open after Qwest receives the power to provide in-region interLATA service.

AT&T comments

AT&T disagrees with Antonuk's finding on this issue and calls it "illogical, inexplicable and ILEC-biased."⁴ AT&T points out that, under Antonuk's proposal, if Qwest is providing substandard service in the months prior to QPAP implementation, it will be wiped off the books once the QPAP becomes effective.

MCC comments

The mock reports should not serve as memory once Qwest receives 271 entry authority.

Commission preliminary finding: The Commission agrees with Antonuk, Qwest and MCC that Qwest will have a clean slate as of the date of QPAP effectiveness.

⁴ AT&T's *Exceptions to the Liberty Consulting Group's QPAP Report* (November 7, 2001), p. 41.

3. QPAP effectiveness if Qwest exits interLATA market. Antonuk rejects the proposal made by AT&T and ELI/Time Warner/XO Utah that the QPAP would continue to operate even if Qwest exited the in-region interLATA market.

Commission preliminary finding: To restate the effect of Qwest's intent as reflected in Antonuk's resolution: if interLATA entry is profitable, Qwest will make Tier 1 payments to CLECs and Tier 2 payments to a state, but if Qwest finds interLATA entry unprofitable, it will exit the interLATA market and cease making Tier 1 and 2 payments for any discriminatory service it provides to CLECs. The Commission seeks comment on why Qwest's right to cease making Tier 1 and, or, Tier 2 payments is consistent with congressional intent in The Telecommunications Act of 1996. The Commission seeks comment on whether any state recommendations to the FCC and any recent FCC approved 271 filings prohibit a RBOC from terminating its performance assurance plan concurrent with the RBOC's independent decision, or FCC requirement, to exit the interLATA market.

E. QPAP inclusion in SGAT and interconnection agreements.

Antonuk agrees with WorldCom that Qwest must address the question of how the QPAP should be made a part of the SGAT. He also asserts that there Qwest should clarify the scope of what a CLEC with an interconnection agreement would be required to elect. He directs Qwest to address these issues in its comments on his *Report*.

Qwest comments

Qwest asserts the QPAP will be included as Attachment K to the SGAT. Qwest adds that if a CLEC wishes to opt into the QPAP, it must do so through an amendment to its interconnection agreement which must include at a minimum, both Attachment K and Attachment B in lieu of other contractual standards and remedies. Additional elections depend on the specifics of the interconnection agreement.

Commission preliminary finding: The Commission requests participants to comment on Qwest's proposal for the method by which CLECs will opt into the QPAP. In addition, the Commission finds that a second sentence should be added to this provision (13.2) as follows:

CLECs may seek amendments to their interconnection agreements to include the QPAP as soon as the Commission approves the QPAP, with the understanding that monetary penalties will not apply until the date Qwest receives Section 271 approval from the FCC.

F. Form of payment to CLECs.

Antonuk rejects WorldCom's suggestion that Qwest make QPAP payments by cash or check; he accepts Qwest's provision that makes payments bill credits. A cash-equivalent transfer is required by Antonuk when there is insufficient amount due CLEC to offset the credit. Antonuk declined to address Covad's request for no offset if payments are due for unrelated debts of CLECs. He also asserts that the QPAP require Qwest to provide credit information in substantially the same format Qwest provides (Exh S-9-QWE-CTI-4).

Qwest comments

Qwest asserts to include a provision committing Qwest to provide payment information substantially similar to that which parties were apprised of (see QPAP 11.2).

Commission preliminary finding: The Commission invites participants' comments on the language submitted by Qwest at Section 11.2.

V. ASSURANCES OF REPORTED DATA'S ACCURACY

Qwest cites the following as assurances that the performance data underlying the QPAP will be reliable: (1) measures will be audited twice by the time the QPAP is effective; (2) the QPAP includes a root-cause analysis provision; (3) the QPAP includes a risk-based audit program; (4) CLECs may request raw data from Qwest in order to verify data and may request audits of

individual performance measures; and, (5) the QPAP provides for audits of Qwest's financial system used to calculate CLEC payments.

A. Audit program.

Antonuk expects that states will jointly oversee the QPAP auditing function, with each state retaining the ability to make sure its particular needs and circumstances are addressed. His recommendations regarding the adoption of an integrated audit program includes the following QPAP amendments:

Providing for a transparent Qwest process for changing the systems, processes, methods and activities of Qwest's measurement regimen and allowing an opportunity for others to challenge such changes.

- The independent auditor should meet quarterly with Qwest to learn of changes made in Qwest's measurement regimen. The auditor would then assess the materiality and propriety of any changes and reports to commissions. Other parties would make the auditor aware of their concerns about changes.

The QPAP should adopt a programmatic approach that allows both pre-planned and as-needed testing of Qwest's measurement regimen.

Approval of Qwest's acceptance of a two-year planning cycle to be conducted under the auspices of the participating commissions with detailed planning recommendations to be made by an outside auditor selected by the commissions and retained for two-year periods.

A recommendation that the auditor also determine the need for individual audits proposed by CLECs that are not otherwise addressed in the current cycle plan.

Allowing states to perform additional auditing if the joint approach is not sufficient.

Using Tier 2 payments to states to pay audit program costs. Qwest should fund the costs of the first 2-year cycle in advance, with the amount to be refunded once Tier 2 payments accumulate. If Tier 2 payments aren't enough to pay for program, then half of the cost will come from Tier 1 escalated payments and half from Qwest.

Qwest comments

Qwest submits the following comments and QPAP revisions on the "Audit Program."

(1) While Qwest asserts to include Antonuk's required audit provisions in the QPAP, Qwest includes other "key concepts" that Antonuk excludes. (2) Qwest adds to the QPAP a section (15.1.3) requiring that the independent auditor coordinate audits to avoid duplication and to not impede Qwest's ability to meet other requirements in the QPAP. (3) Qwest is hopeful that states participate in a common audit, and prefers requiring common audits. (4) Qwest adds it is imperative that audit plans and operations not impede Qwest's day-to-day performance under the QPAP regime. (5) Qwest expresses concern with how disputes arising from audits will be processed. As regards CLEC proposed audits, Qwest asserts that Antonuk did not propose a "materiality decision criteria" and notes to add such criteria as the basis for an audit: small discrepancies alone are(sic) not (word and emphasis added) a reasonable basis for an audit. (6) Qwest asserts to add a provision disallowing audits during the pendency of dispute resolutions. (7) Last, and arguably consistent with QPAP 14.4, Qwest adds a provision that a CLEC may not propose auditing data older than three years (see QPAP 15.3).

Commission preliminary finding: For resource and efficiency reasons, the Commission agrees with Antonuk's recommendation that state commissions should jointly oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from the other states. If such a joint regulatory oversight group is formed by some or all of

the Qwest states in order to conduct their QPAP review and auditing responsibilities, the Montana Commission likely will participate. However, QPAP Section 15 (concerning the audit program) is currently written as if there is a multistate oversight regime already in place and, therefore, does not take into account the possibility that states will not form a joint oversight body and the Commission will conduct its QPAP audit responsibilities on its own. Other provisions of Section 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current Section 15 contains provisions that limit the Commission's discretion to determine the procedure, scope, timing and conduct of audits. The Commission revises Section 15.1 through 15.4 below to address these concerns.

15.1 Audits of the PAP shall be conducted ~~in a two-year cycle~~ under the auspices of the ~~participating Commissions~~ Commission in accordance with a detailed audit plan developed by an independent auditor and approved by the Commission ~~retained for a two-year period~~. The ~~participating Commissions~~ Commission shall select the independent auditor with input from Qwest and the CLECs.

~~15.1.1 The participating Commissions shall form an oversight committee of Commissioners who will choose the independent auditor and approve the audit plan. Any disputes as to the choice of auditor or the scope of the audit shall be resolved through a vote of the chairs of the participating commissions pursuant to Section 15.1.4.~~

15.1.2 The initial audit plan shall be conducted over two years, with audit periods subsequent to the initial audit to be determined by the Commission. The Commission will determine the scope of and procedure for the audit plan, which, at a minimum, will identify the specific performance measurements to be audited, the specific tests to be conducted, and the entity to conduct them. The initial audit plan will give priority to auditing the higher risk areas identified in the OSS report. ~~The two-year cycle will examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined during the two-year cycle. The first year of a two-year cycle will concentrate on areas most likely to require follow-up in the second year.~~

15.1.3 The Commission will attempt to coordinate its audit plan shall be ~~coordinated~~ with other audit plans that may be conducted by other state

commissions so as to avoid duplication. The audit shall be conducted so as not to shall not impede Qwest's ability to comply with the other provisions of the PAP and should be of a nature and scope that it can be conducted in accordance with the reasonable course of Qwest's business operations.

15.1.4 Any dispute arising out of the audit plan, the conduct of the audit, or audit results shall be resolved by the Commission oversight committee of Commissioners. ~~Decisions of the oversight committee of Commissioners may be appealed to a committee of the chairs of the participating Commissions.~~

15.2 Qwest may not make CLEC-affecting changes to the performance measurement and reporting system without Commission approval. Qwest may make non-CLEC-affecting changes to its management processes to enhance their accuracy and efficiency more accurate or more efficient to perform without sacrificing accuracy. These changes are at Qwest's discretion, but will be reported to the independent auditor in quarterly meetings in which the auditor may ask questions about changes made in the Qwest measurement regimen management processes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the participating Commissions and, where the Commissions deems it appropriate, to other participants. The Commission may review in the OPAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy of integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the initiating party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by ~~The dispute resolution provision of section 18.0 is available to~~ any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based

on the auditor's professional judgment). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the QPAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. ~~The remainder of the audit expenses will be paid one half from Tier 1 funds in the Special Fund and one half by Qwest.~~ If Tier 2 funds are not sufficient to cover audit costs, the Commission will develop an additional funding method to include contributions from CLECs' Tier 1 payments and from Qwest.

B. PSC access to CLEC raw data (Section 14.2).

Antonuk rejects AT&T's suggestion that this provision, that allows a PSC to request CLEC specific raw data from Qwest, be eliminated. Antonuk recommends adding QPAP language related to confidentiality concerns.

C. Providing CLECs their raw data.

Antonuk finds that upon request Qwest should provide raw data to CLECs as soon as possible. He declines to set a deadline. He finds that the QPAP should require Qwest to allow payments to be recalculated retroactively for 3 years and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. Thus, Antonuk finds it sufficient that Qwest maintain records in a readily usable form for one year while remaining records are retained in an archived format. He finds that the QPAP should require Qwest to distribute CLEC-specific data in a form that will allow CLECs to understand and verify them.

Qwest comments

Qwest states to include in the QPAP (14.2) a provision that modifies slightly that recommended by Antonuk. As for the provision of raw data to CLECs, Qwest incorporates into the QPAP (14.4) a requirement that documents be retained.

Commission preliminary finding: The Commission agrees with Antonuk's recommendations, but asks participants to comment on the relevant QPAP language submitted by Qwest.

D. Penalties for late and/or inaccurate QPAP reports.

Antonuk recommends revising the QPAP to impose a penalty if Qwest neglects to file QPAP information on a measure of 1/5th the amount for failure to file a QPAP report at all (subject to a cap equal to the daily amount for failure to file any report). He finds that the best way to deal with report accuracy is to include the issue when formulating audit plans. For late QPAP reports, he finds that Qwest should pay \$500/day for a report filed in the second week after it's due, \$1000/day in the third week and \$2000/day for anything later than that. (The QPAP allows Qwest to request a waiver of late report payments.)

Qwest comments

Qwest includes in the QPAP (14.3) payment obligations consistent with Antonuk's Report.

VI. OTHER ISSUES

A. Prohibiting QPAP payment recovery in rates.

Antonuk rejects AT&T's proposal adding that the FCC and state PSCs can decide the issue.

AT&T comments

AT&T continues to argue that the Commission should mandate that Qwest may not recover QPAP costs from ratepayers. In addition, AT&T proposes language for a new provision to be added to the QPAP that explicitly prohibits Qwest from including QPAP

payments as expenses in any Qwest revenue requirement or reflecting them in increased rates to CLECs.

Commission preliminary finding: As for the recovery of QPAP payments in rates, the Commission agrees with Antonuk as to jurisdiction and finds that no such recovery is allowed in rates this Commission regulates.

B. No-admissions clause (Section 13.4.1).

Antonuk finds that the QPAP restriction in this section does not constrain the use of the information contained within QPAP reports so there is no need to delete the clause.

C. Qwest's responses to FCC-initiated changes.

Qwest proposed 3 QPAP changes that were prompted by informal suggestions from the FCC: (1) eliminating 2 families of OP-3 submeasurements so that no missed order would go uncompensated; (2) removing the adjustment for two commission's rate orders (not Montana); (3) making two changes in the statistical values used to test Tier 2 parity. No one objected to these proposals so Antonuk adopted them.

Qwest comments

Qwest asserts to make appropriate deletions to the QPAP (7.2, but also see Attachment, footnote c and Attachment 3).

D. Specification of state commission powers (Section 12.3).

This section allows a state commission to recommend to the FCC that Qwest's 271 authority be revoked in the event Qwest reaches the annual cap. As it does not add to any power Commission do not already have, Antonuk eliminates this provision as it might be construed to limit a commission's authority to respond to circumstances that may arise other than in the QPAP.

Qwest comments

Qwest strikes from the QPAP Section 12.3 cited here.

Commission preliminary finding: The Commission agrees with Antonuk's resolution.

- E. Issue deferred to QPAP from Final Report on Checklist Item # 4 – Unbundled Loops

Qwest's delays in making these loops available and the impact on competition led to the following conclusion in the Commission's preliminary report:

Issue 4 – Commission Preliminary Finding

The Commission agrees with the facilitator's findings regarding the need for expeditious provision of infrequently ordered unbundled services. The Commission considers the fact that comparatively few of these loops were ordered does not necessarily indicate the losses to competition that may have occurred. The Commission will consider whether this issue should be added to the post-entry performance plan considerations. (p. 43).

In its comments, Qwest argues that it is unnecessary to consider infrequently ordered services in QPAP because of the special request process (SRP) already approved by the facilitator. The Commission's final report finds:

[i]t is clear from many sources that Qwest has made substantial improvements in its provisioning of wholesale service and technical support for CLEC wholesale ordering activities including for the specific UNEs at issue here. The Commission's concern was over the time it appears to have taken for new or infrequent services to be provisioned and provisioned correctly by Qwest and the possible impact this may have on competition, especially the competition represented by smaller companies which may be more likely to be active over a sustained period in Montana. Once a product or service is well-developed and part of the performance measures there are means in the QPAP for monitoring performance and parity. The Commission agrees with Qwest that the procedures detailed in Exhibit F (of the SGAT) concerning the special request process go far to alleviating the Commission's concern over the impact of provisioning in the case of infrequently ordered UNEs. In addition, as a consequence of the CLEC Forum held January 9, 2002, parties have agreed to discuss and make proposals concerning processes on how Qwest and small CLECs can improve interaction. The Commission defers final closure of this issue pending the outcome of those discussions.

The Commission invites comments on what it might do to facilitate better interaction between companies and therefore competition over the long-term in Montana. If the Commission should develop an expedited complaint procedure to resolve wholesale service disputes, what might it look like? If the Commission sponsors meetings, perhaps modeled on the CLEC Forum where parties can discuss issues and possibly resolve them prior to going to a complaint or dispute process, should they be, for example, annual or quarterly? How long would this need to go on e.g., one year after Qwest receives 271 approval, or two years?

QPAP LANGUAGE ISSUES NOT ADDRESSED IN ANTONUK'S REPORT

The Commission has reviewed the QPAP language in the current 11/6/2001 version and makes the following preliminary findings.

Section 2.1.1: This provision should be modified to reflect the finding that Tier 2 payments will be paid by Qwest into an interest-bearing escrow account set up by Qwest to hold the Montana Special Fund monies, and will not be paid to the state general fund. Every year, the Commission will determine whether the money in the Special Fund exceeds the amount of money the Commission expects to spend to perform its QPAP-related activities. If there is an amount in excess of what the Commission determines is necessary, the Commission will direct Qwest as to its disposition. (The Commission's direction will be to deposit the excess in the state general fund.)

Section 7.5: Everything after the first sentence should be deleted. The text to be deleted refers to the circumstance that would occur if the Commission was statutorily unable to direct the use of Tier 2 payments.

Section 10.3: Delete this provision entirely. The scope of the 6-month reviews is addressed in Section 16.

Section 11.3: Revise as follows:

A Special Fund shall be created for the purpose of funding the Commission's auditing, administration and oversight of the QPAP (a) payment of an independent auditor and audit costs as specified in section 15.0, (b) payment of an independent arbitrator to resolve disputes arising out of the six-month review as described in section 16.0, and (c) payment of other expenses incurred by the participating Commissions in the regional administration of the QPAP. Nothing in this section prohibits the Commission from joining with other state commissions in a multistate effort to conduct and develop a method for joint funding for some or all of these activities.

Sections 11.3.1 and 11.3.2: These provisions should be revised to reflect the current circumstances where this Commission will be acting on its own in its QPAP oversight activities, rather than participating in a multistate effort.

Section 13.1: This provision should state that the QPAP will be effective on the date Qwest receives section 271 approval from the FCC for Montana.

The Commission requests participants to review closely the language in the 11/6/2001 QPAP, as well as any language changes recommended by the Commission in this report. Participants should include in their comments on this report any concerns they have as to whether the language conforms to this Commission's findings, and propose substitute language where appropriate.

BY THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

EXHIBIT C

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Investigation Into)	
)	
U S WEST COMMUNICATIONS, INC.'s ¹)	DOCKET NO. UT-003022
)	
Compliance With Section 271 of the)	
Telecommunications Act of 1996)	
_____)	
)	
In the Matter of)	
)	
U S WEST COMMUNICATIONS, INC.'s)	DOCKET NO. UT-003040
)	
Statement of Generally Available Terms)	
Pursuant to Section 252(f) of the)	
Telecommunications Act of 1996)	
_____)	

THIRTIETH SUPPLEMENTAL ORDER

COMMISSION ORDER² ADDRESSING QWEST'S PERFORMANCE
ASSURANCE PLAN

¹ Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the name Qwest in this Order.

² This proceeding is designed, among other things, to produce a recommendation to the Federal Communications Commission regarding Qwest's compliance with certain requirements of law. This Order addresses some of those requirements. The process adopted for this proceeding contemplates that interim orders including this one will form the basis for a single final order, incorporating previous orders, updated as appropriate. The Commission will entertain motions for reconsideration of this Order so that issues may be timely resolved.

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I. SYNOPSIS

- 1 *In this Order, the Commission rejects certain recommendations made by the Multi-state Facilitator in his QPAP Report, adopts the remainder of the Facilitator's recommendations, and directs Qwest to make certain modifications to its performance assurance plan for Washington state.*

II. BACKGROUND

- 2 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST), with the requirements of section 271 of the Telecommunications Act of 1996 (the Act),³ and to review and consider approval of Qwest's Statement of Generally Available Terms (SGAT) under section 252(f)(2) of the Act. The Commission allowed Qwest's SGAT to go into effect at its June 16, 2000, open meeting. The Commission is reviewing the provisions of the SGAT in this proceeding to determine whether the provisions comply with section 252(d) and section 251 of the Act, as well as requirements of Washington state law.
- 3 In this proceeding, the Commission must determine whether to recommend to the Federal Communications Commission (FCC) that Qwest be allowed to enter the interLATA toll market in Washington state. Through a series of workshops, hearings, and orders, the Commission has reviewed Qwest's compliance with a number of the requirements of section 271. Through hearings that are the subject of this Order, the Commission heard testimony and evidence on the subject of Qwest's Performance Assurance Plan (QPAP). The QPAP is designed as a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.
- 4 Section 271 sets forth a number of requirements that a Bell Operating Company (BOC), such as Qwest, must meet before obtaining the FCC's approval to provide in-region, interLATA service in a state. In addition to demonstrating that the BOC has fully implemented the 14-point competitive checklist set forth in section 271(c)(2)(B), a BOC must show that it satisfies the requirements of section 271(c)(1)(A), referred to as "Track A," or section 271(c)(1)(B), referred to as "Track B," demonstrate that it is in compliance with section 272, and that the BOC's entry

³ Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.*

into the in-region, interLATA market is “consistent with the public interest, convenience, and necessity.”⁴

5 The public interest requirement provides “an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.”⁵ One of the factors the FCC has considered is whether there is “sufficient assurance that markets will remain open after grant of the application,”⁶ and in particular, “whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.”⁷

6 The FCC has relied on post-entry performance assurance plans developed collaboratively by the BOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, “in combination with other factors, provide strong assurance that the local market will remain open after [the BOC] receives section 271 authorization.”⁸

7 In approving BOC section 271 applications, the FCC has applied a “zone of reasonableness test” in determining whether a performance assurance plan was “likely to provide incentives that are sufficient to foster post-entry performance.”⁹ The FCC has looked to the following five characteristics in applying its zone of reasonableness test:¹⁰

⁴ 47 U.S.C. §271(d)(3)(C); see also, *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶18 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

⁵ *Bell Atlantic New York Order*, ¶423.

⁶ *Id.*

⁷ *Id.*, ¶429.

⁸ *Id.*; see also *In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238, ¶¶ 422-23 (rel. June 30, 2000) (*SBC Texas Order*); *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶¶269-70 (rel. Jan. 22, 2001) (*Kansas/Oklahoma Order*).

⁹ *Bell Atlantic New York Order*, ¶433; *SBC Texas Order*, ¶423.

¹⁰ *Bell Atlantic New York Order*, ¶433; *In the Matter of the Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, ¶128, n.442 (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- A self executing mechanism that does not leave the door open to unreasonable litigation and appeal; and
- Reasonable assurances that the reported data is accurate.

8 While the FCC has never required BOC applicants to demonstrate that they are subject to performance assurance plans as a condition of section 271 approval, the FCC does consider such plans “probative evidence that the BOC will continue to meet its section 271 obligations and that its entry is consistent with the public interest.”¹¹ The FCC does not impose any structural requirements on a state developed plan. In fact, the FCC recognizes that “state commissions will continue to build on their own work and the work of other states” in developing plans.¹² Overall the FCC looks to see whether the plan is likely to be effective “in practice” in deterring and enforcing against backsliding behavior by the BOC.¹³

III. PROCEDURAL HISTORY

9 In August 2000, eleven states in Qwest’s region--Washington, Oregon, Iowa, Nebraska, North Dakota, South Dakota, Utah, Wyoming, Montana, Idaho, and New Mexico--formed a collaborative to discuss Qwest’s Post-Entry Performance Plan (PEPP), known as the Regional Oversight Committee (ROC) PEPP collaborative. After a number of workshops were held to determine the process and resolve substantive issues, Qwest ended its participation in the collaborative process in May 2001. Qwest stated its intent to prepare a Performance Assurance Plan (PAP) incorporating those agreements reached in the collaborative, and to file its PAP in separately in each state.

10 On June 27, 2001, after hearing comments from participants in the PEPP collaborative and the Multi-state Proceeding,¹⁴ Mr. John Antonuk, the facilitator for

¹¹ *SBC Texas Order*, ¶420; *Bell Atlantic New York Order*, ¶429; *Kansas/Oklahoma Order*, ¶269.

¹² *Verizon Pennsylvania Order*, ¶128.

¹³ *SBC Texas Order*, ¶421.

¹⁴ Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico--have held a joint proceeding similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate

the Multi-state Proceeding, issued Procedural Recommendations for Considering Qwest's PAP. In those recommendations, Mr. Antonuk determined that "there would be substantial efficiency in addressing Qwest's PAP" in a single proceeding as the factual issues raised by the PAP would be similar in each state. The Facilitator invited states participating in the PEPP collaborative to participate in the Multi-state Proceeding for purposes of considering Qwest's PAP.

- 11 On June 29, 2001, Qwest filed its PAP and a list of resolved and unresolved issues with the parties in the Multi-state Proceeding. This version of the QPAP has been admitted in this proceeding as Exhibit 1200. On July 9, 2001, the Commission sought comments from the parties on whether the Washington Commission should participate in the Multi-state Proceeding to consider Qwest's PAP.
- 12 On July 23, 2001, the Commission issued its *12th Supplemental Order*, notifying the parties that it intended to participate with a number of other states in the initial review of Qwest's proposed Performance Assurance Plan (QPAP) due to the efficiencies and continuity of process offered by a joint process. The Commission ordered the parties to follow the hearing schedule adopted by Mr. Antonuk. That schedule anticipated the issuance of a report at the conclusion of the hearings. The Commission explained that it considered the Facilitator's Report to be analogous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in the Report would be subject to review by the Commission.
- 13 Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado. The seven states participating in the Multi-state Proceeding were joined by the states of Washington and Nebraska. The transcripts of the hearing and exhibits admitted during the hearings were marked and admitted into this Commission's proceeding during hearings held on December 18-19, 2001. The Facilitator issued his Report on Qwest's Performance Assurance Plan (QPAP Report, Report, or Facilitator's Report) on October 22, 2001. *Ex. 1285*.
- 14 On October 11, 2001, the Commission issued a notice scheduling hearings for December 18-21, 2001 to discuss the QPAP for December 18-21, 2001. The Commission convened a prehearing conference on October 30, 2001 before administrative law judge Ann E. Rendahl to identify the issues to be presented during the hearings and establish a schedule for filing comments and exhibits in preparation for the hearings. By notice issued on October 24, 2001, the Commission sought comment from all parties concerning the QPAP Report, and posed several specific questions to the parties. On that same date, the Commission issued bench requests to Qwest concerning the QPAP Report, specifically requesting that Qwest file a new version of the QPAP, red-lined to reflect the Facilitator's recommendations.

- 15 The 21st *Supplemental Order, Prehearing Conference Order*, identifies four topics for the hearings in December: the QPAP Report, Compliance with Commission Orders, Qwest Performance Results, and Data Verification. However, the 23rd *Supplemental Order*, a prehearing conference order issued on December 14, 2001, granted a motion to continue hearing on Qwest's performance results and data verification until The Liberty Consulting Group had completed its report on the reconciliation of Qwest and CLEC operational reporting data.
- 16 Qwest filed responses to the bench requests on November 7, 2001, including its red-lined QPAP. *See Ex. 1217*. All parties filed responses to the Commission's questions and any comments on Qwest's responses to the bench requests on November 21, 2001. Parties filed responsive or rebuttal comments on December 5, 2001. The Commission heard comments and arguments from the parties concerning disputed issues arising from the QPAP Report on December 18 and 19, 2001, and admitted Exhibits 1200 through 1284, including exhibits and transcripts from the Multi-state hearings in August 2001. Subsequent to the hearing, the Administrative Law Judge admitted the responses to Bench Requests 39 through 42, and Qwest's illustrative payments pursuant to the QPAP, as Exhibits 1286 through 1289, and Exhibit 1223, accordingly.
- 17 This Order resolves the issues raised by the parties in briefs, comments, and oral argument to the Commission regarding the content of Qwest's Performance Assurance Plan for the state of Washington. As stated in the 12th *Supplemental Order*, the Commission deems the QPAP Report an initial order of the Commission. The QPAP Report stated findings and conclusions on all material facts inquired into during the course of the hearings on Qwest's Performance Assurance Plan. The Commission rejects certain findings and conclusions made in the QPAP Report, and adopts the remainder, with the modifications discussed below.

IV. PARTIES AND REPRESENTATIVES

- 18 The following parties and their representatives participated in the August 2001 hearings in the Multi-state Proceeding in Denver, Colorado concerning Qwest's Performance Assurance Plan: Qwest, by Lynn A. Stang, attorney, Denver, CO; AT&T, by Steven Weigler and John Finnegan, attorneys, Denver, CO; WorldCom, Inc. (WorldCom), by Tom Dixon, attorney, Denver, CO; Z-Tel Communications (Z-Tel), by Claudia Earls, attorney, Tampa Bay, FL; XO Utah, Inc., XO Washington, Inc. (XO), and Time-Warner Telecom of Washington (TWT), by Gregory J. Kopta, attorney, Seattle, WA; Covad Communications, Inc. (Covad) by Megan Dobernek, attorney, Denver, CO; Sprint by Barbara Young, attorney, Mount Hood, OR; SBC Communications, by Cheryl Boyd, attorney; New Mexico Advocacy Staff, by Marianne Reilly, attorney, Santa Fe, NM; Public Counsel, by Robert W. Cromwell, Jr., Assistant Attorney General, Seattle WA.

- 19 The following parties and their representatives participated in the December 2001 hearings concerning Qwest's Performance Assurance Plan: Qwest, by Lisa Anderl and Adam Sherr, attorneys, Seattle, WA, and Lynn A. Stang, attorney, Denver CO; AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), by Steven Weigler, attorney, Denver, CO; WorldCom, by Michel Singer-Nelson, attorney, Denver, CO; Time-Warner Telecom (TWT), XO Washington, Inc., and Electric Lightwave Inc. (ELI), by Gregory J. Kopta, attorney, Seattle, WA; Covad, by Megan Doberneck, Denver CO; and Public Counsel by Robert W. Cromwell, Jr., Assistant Attorney General.

V. THE QPAP

- 20 As stated above, the QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state. Qwest intends the QPAP to be included in the SGAT as Exhibit K, and to be adopted as a part of a CLEC's approved interconnection agreement with Qwest.
- 21 The QPAP is a two-tiered plan, meaning Qwest must make payments to CLECs (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain parity standards or benchmarks, on a per-occurrence or per-measurement basis. The payments, and calculation of the payments, as described in sections 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on the payments.
- 22 The parity standards and benchmarks were developed in the PEPP collaborative using statistical measurements, based on certain performance measurements. The statistical measurements are described in QPAP sections 4 and 5. The performance measurements included in the QPAP are defined by Performance Indicator Definitions, or PIDs, developed in the ROC's ongoing Operational Support System (OSS) collaborative.
- 23 Section 14 of the QPAP requires Qwest to make certain reports to state commissions and CLECs concerning its performance in previous months. As modified by the Facilitator, section 15 of the QPAP provides for joint audits and investigations of the QPAP by participating state Commissions, who would select an independent auditor. Expenses for such audits and investigations would be paid for by a combination of Tier 1 and Tier 2 funds. *Ex. 1217, Section 15.4*. In addition, section 16 of the QPAP provides for a review conducted every six months to determine whether any performance measurements should be added, deleted, or modified, whether the benchmark or parity standards should be modified, and whether the payment structure should be modified.

- 24 Finally, section 13 of the QPAP includes a set of limitations on the operation and administration of the QPAP, such as the effective date of the plan, when Qwest is excused from making payments, and a requirement that CLECs make an election of remedies, for CLECs.

VI. DISCUSSION

- 25 Following the discussion below concerning the standard of review and consideration of other state and BOC plans, the issues are organized according to the FCC's five characteristics for determining whether a performance plan falls into the "zone of reasonableness."

A. STANDARD OF REVIEW

- 26 The QPAP Report includes a section titled "Standard of Review," in which the Facilitator set forth the criteria for evaluating the sufficiency of the QPAP. *QPAP Report at 4-6*. The Facilitator included not only the FCC's five characteristics of its zone of reasonableness test, but also a number of "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry. *Id. at 6*. A number of CLECs object to the Facilitator's use of additional criteria, arguing that the Commission should reject and strike these additional criteria.

AT&T

- 27 AT&T does agree with the Facilitator's statement that "the task is not to decide how to increase incentives, but to decide upon the sufficiency of those proposed, which includes at least a full consideration of their comparability with those already reviewed by the FCC." *AT&T's Comments on the Liberty Consulting Group's QPAP Report at 4 (AT&T Comments)*. However, AT&T argues that the Facilitator's additional criteria do not provide a "clearly articulated standard" as required by the FCC's five-prong zone of reasonableness test. *Id. at 5*. Specifically, AT&T objects to the Facilitator's statements on page 6 of the Report that it is irrelevant whether greater burdens on Qwest would increase its incentives to comply with service obligations, and that making such an issue relevant 'is not only fantastical, it is beyond any rational conception of fairness and propriety.' *Id. at 5*. AT&T notes that the Staff of the Utah Division of Public Utilities issued its own version of the QPAP Report, striking this particular language.¹⁵ *Id.*
- 28 AT&T objects to the Facilitator's consideration of whether "the incentive aspects of the plan (i.e., those that go beyond compensating CLECs for actual harm) impose a price on in-region, interLATA entry that would be irrational for a BOC to pay for the privilege of such entry." *Id. at 4*. AT&T argues that the QPAP is intended to create

¹⁵ *Utah Division of Public Utilities QPAP Report (October 26, 2001) (Utah Staff Report)*.

incentives for Qwest to perform, not to determine the “toll” a BOC should pay for the privilege of section 271 entry, or the “strain” upon a BOC for paying CLECs for its failure to perform. *Id.* at 6.

WorldCom

- 29 WorldCom echoes AT&T’s objections to the additional criteria as vague, ambiguous, and inconsistent with FCC orders. *WorldCom’s Comments on Liberty Consulting’s Report Regarding Qwest’s Performance Assurance Plan at 2 (WorldCom Comments)*. WorldCom recommends the Commission either ignore or strike the Facilitator’s additional criteria. *Id.* Further, WorldCom specifically objects to the Facilitator’s conclusion that it is irrelevant to answer the question of whether greater burdens on Qwest would increase its incentives to perform. *Id.* WorldCom asserts that the FCC has found the issue to be highly relevant, stating in its *Verizon Massachusetts Order* that “[d]amages and penalties should be set at a level above the simple cost of doing business.”¹⁶ *Id.* at 3.

Joint CLECs

- 30 ELI, TWT, and XO (Joint CLECs) object that the Facilitator created new legal standards for evaluating the QPAP. *ELI, TWT, and XO Comments on QPAP Report at 4 (Joint CLEC Comments)*. The Joint CLECs assert that the Facilitator imposed his own beliefs of the purpose of the QPAP, rendering the recommendations in the Report irreconcilable with the objective that a plan provide “a meaningful and significant incentive to comply with designated performance standards.” *Id.* at 5. The Joint CLECs also argue that the Facilitator departed from basic principles of administrative law by failing to require Qwest to pre-file testimony with its proposed QPAP, and by shifting the burden of proof to the CLECs to show that the QPAP was unreasonable. *Id.* at 3.
- 31 The Joint CLECs assert that the Commission should reject the QPAP Report in its entirety, and conduct its own independent analysis of the QPAP and the record evidence. *Id.* at 6.

Qwest

- 32 Qwest defends the process the Facilitator used to evaluate the QPAP, arguing that the Utah Staff concluded that the process was sufficient. *Qwest Corporation’s Rebuttal to Comments Filed on the Facilitator’s Report at 2-3 (Qwest Rebuttal)*. Qwest

¹⁶ *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, ¶240 (rel. April 16, 2001) (*Verizon Massachusetts Order*).

disputes the CLECs' criticism of the additional factors set forth by the Facilitator, arguing that the Facilitator was justified in asking questions about the extent of the burden Qwest must bear in making payments to the CLECs. *Id. at 4-5*. Qwest argues that the Commission should approve its revised QPAP as it is consistent with other plans approved by the FCC and satisfies the FCC's zone of reasonableness test. *Id. at 7*.

Discussion and Decision

- 33 As we stated in the 12th *Supplemental Order*, we will treat the Facilitator's Report as an initial order of the Commission. However, that does not mean that we must accept the analysis or recommendation made by the Facilitator on every issue. We will review the evidence of record and the arguments of the parties when reviewing the Facilitator's recommendations, just as we review the recommendations and decisions of administrative law judges in this and every other proceeding before us.
- 34 We do not find that the process was in any way in error, deficient, or compromised. The Facilitator established a process that provided an opportunity for the parties to be heard, for evidence to be gathered, and for issues to be joined. Evidence was admitted and a transcript prepared. Parties were given an opportunity to submit briefs prior to and after the hearing. This proceeding is a creature of the Telecommunications Act, not state law, and while we have endeavored to apply and follow our procedural rules, there is no requirement that we do so in this matter.
- 35 We find that the Facilitator correctly stated the five prongs of the FCC's zone of reasonableness test, but went too far in stating his own "considerations" for review of Qwest's QPAP and his comments on increasing Qwest's incentives. The Facilitator's considerations appear to focus primarily on the ongoing dispute between Qwest and the CLECs about Qwest's total payment liability, and how much is sufficient to create the proper incentive for continued compliance with section 271 requirements. This issue is addressed more fully below.
- 36 While Qwest is correct that the FCC's standards and zone of reasonableness are not a "straitjacket," they do provide sufficient guidance to evaluate Qwest's plan. No more is necessary to consider Qwest's proposed plan. We therefore reject the Facilitator's statements on pages 5 and 6 of the Report, beginning with the sentence: "The ultimate decision on the QPAP's sufficiency, as the FCC addresses the matter, should be one that takes into account the following considerations:"
- 37 We find that the FCC's "zone of reasonableness" test is the most appropriate in determining whether Qwest's proposed plan, as modified by the Facilitator, is sufficient to deter and enforce backsliding behavior and whether any of the changes proposed by the CLECs are necessary. While we will apply the FCC's standards in evaluating Qwest's proposed plan, we continue to believe that this Commission has

authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable or would stifle competition in the state. *See RCW 80.04.110, RCW 80.36.300.* The nature of the Commission's jurisdiction to require the QPAP and oversee its implementation and operation is discussed further below concerning the six-month review process.

B. CONSIDERATION OF OTHER STATE OR BOC PLANS

38 During the December hearings, we posed the question of whether the Commission should look solely to the language of the QPAP in resolving disputed issues, or whether the Commission may consider other state or BOC plans as a whole or in part to develop a plan for Washington. *Tr. 5934.*

39 For example, there was a great deal of discussion about a proposed plan under development before the Colorado Public Utilities Commission, referred to as the CPAP.¹⁷ The Colorado Commission did not join the other states in the ROC PEPP collaborative, but developed a plan independently through the use of a special master. *Tr. 5934-35.* We have recently learned that the Colorado Commission has approved a final plan. In addition, parties discussed that the Utah Staff had modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission. *Tr. 5960-61.*

CLECs and Public Counsel

40 In its comments on the Report, and during the hearing, Public Counsel advocated adoption of the CPAP, asserting that it would provide the greatest benefit to the consumer. *Tr. 5943; Public Counsel's Comments on the QPAP Report at 2-3 (Public Counsel Comments).* AT&T, WorldCom and Covad also advocated adoption of the CPAP or use of the CPAP as a template plan. In addition, WorldCom advocated review of the Utah Staff Report.

Qwest

41 In its rebuttal comments and during the hearing, Qwest objected to the use or "importation" of any other proposed plan or portion of a plan in developing the QPAP for Washington. *Qwest Rebuttal at 6-7; Tr. 5956-57.* Specifically, Qwest argues that other plans, such as the CPAP, have been developed under different processes, using

¹⁷ The version of the CPAP referred to during the hearing, and in this Order, was provided by the Colorado Hearing Examiner as Attachment A to the Decision on Motions for Modification and Clarification. *See In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in C Colorado*, Decision on Motions for Modification and Clarification of the Colorado Performance Assurance Plan, CPUC Docket No. 011-041T, Decision No. R01-1142-I (Nov. 5, 2001) (*November 5, 2001 Colorado Decision*).

a different record. Qwest objects that importing or using all or part of another plan violates any sense of procedural fairness before this Commission. *Id.*

Discussion and Decision

42 We agree with Qwest that it would not be appropriate to “disavow” the process of developing the QPAP in this state by wholly adopting another state’s proposed plan. However, we do not believe we are limited to looking solely to Qwest’s proposed plan to resolve the disputed issues. The FCC has noted that it expects “state commissions will continue to build on their own work and the work of other states” in developing plans.¹⁸ Further, the FCC has stated that “the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time.”¹⁹ Therefore, we find it appropriate to look to other state plans, finalized or in progress, to determine whether elements of a performance assurance plan are sufficient for Washington state.

C. MEANINGFUL AND SIGNIFICANT INCENTIVE

1. Total Payment Liability

43 We look to the total payment liability established in the QPAP, as well as remedies, to determine whether Qwest has met the criteria of a plan that provides meaningful and significant incentives to comply with designated performance standards. In other plans, BOCs have established a revenue cap to limit the total amount of revenue the BOC must annually put at risk of payment to CLECs for failure to meet designated performance standards.

44 Section 12 of the QPAP establishes a cap on total payments. *Ex. 1217*. The parties remain in dispute over the following issues: (1) the percent of local exchange revenue that Qwest must put at risk; (2) the base year used to calculate the amount of revenue at risk; and (3) whether the amount of revenue at risk should be permitted to increase or decrease based on Qwest performance.

45 The QPAP Report recommends a 36 percent revenue cap, i.e., that Qwest should initially place 36 percent of its 1999 ARMIS Net Revenue²⁰ at risk of payment to

¹⁸ *Verizon Pennsylvania Order*, ¶128.

¹⁹ *Id.*

²⁰ The Automated Reporting Management Information System (ARMIS) was initiated in 1987 for collecting financial and operational data from the largest telecommunication carriers regulated by the FCC. Additional ARMIS reports were added in 1991 to collect service quality and network infrastructure information from local exchange carriers subject to price cap regulations, and in 1992 for the collection of statistical data formerly included in Form M. Today, ARMIS consists of ten public reports. For more information see <http://www.fcc.gov/wcb/armis/>. See also *Bell Atlantic New York Order*, n. 1332 for discussion of the calculation of “net return”.

CLECs and the state for failure to meet designated performance standards. *Report at 16*. The Report also allows the revenue cap to move up by as much as 8 percent or down by as much as 6 percent, depending on Qwest's performance. *Report at 18-19*.

a. The Revenue Cap

AT&T

46 AT&T agrees with the recommendation in the Utah Staff Report to use a 44 percent cap, based on their finding that a 36 percent cap did not provide sufficient incentive for the BOC in New York state. *AT&T Comments at 9*.

WorldCom

47 WorldCom opposes any cap on Qwest's total payment liability. WorldCom requests, at a minimum, that the Commission adopt the approach of the Utah Staff by setting the cap at 44 percent. *WorldCom Comments at 3-4*.

Joint CLECs

48 The Joint CLECs express the concern that any limitation on Qwest's obligation to make QPAP payments would make such payments nothing more than the cost of doing business. *Joint CLEC Comments at 19*.

Qwest

49 Qwest argues that the FCC has repeatedly approved a limit on BOC liability of 36 percent of the BOC's net revenue. Qwest argues that the FCC has found such an amount at risk to constitute a meaningful incentive. *Qwest Rebuttal Comments at 8*.

Discussion and Decision

50 The FCC established the first performance plan for Bell Atlantic – New York (BANY), now Verizon – New York, with a payment liability limit based on 36 percent of BANY's 1999 ARMIS Net Revenue.²¹ Since that time, the FCC has approved other section 271 applications that included performance assurance plans with a 36 percent liability limit.²² Where the FCC has not set a 36 percent cap, it has approved a limit on the amount at risk.²³ WorldCom asks the Commission to remove

²¹ *Bell Atlantic New York Order*, ¶436. The New York Commission later increased the amount to 44 percent to address certain issues that arose after the grant of section 271 authority.

²² *SBC Texas Order*, ¶424, n.1235; *Kansas/Oklahoma Order*, ¶274, n.837.

²³ *Verizon Pennsylvania Order*, ¶129; *Verizon Massachusetts Order*, ¶241, n.769; *In the Matter of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA*

any limit on the amount of revenue at risk in the QPAP. Based on the FCC's determinations, we believe it is reasonable that the total amount of payments made by Qwest to CLECs and the state under the QPAP should be capped.

51 AT&T and WorldCom request, in the alternative, that the cap on total payment liability be set at 44 percent of ARMIS Net Revenue. We are not persuaded that setting the cap at 44 percent represents an improvement to the QPAP. In response to Bench Request No. 38, Qwest provided the Commission with data showing the amount of payments Qwest would have made under the QPAP from June through September of 2001. *Exs. 1219-C, 1221-C*. Qwest's response shows that on an annualized basis, the company would have made payments far below the \$81 million of revenue it proposes to put at risk based on the 36 percent cap. *Id.* Given the FCC's actions on this issue to date, and Qwest's current performance, there is no basis to modify the Facilitator's recommendation that Qwest place 36 percent of ARMIS Net Revenue at risk for payment to CLECs for failure to meet designated performance standards.

b. 1999 ARMIS Net Revenue

52 In other section 271 applications, the total amount of revenue liability has been calculated based on the amount of local exchange revenue reported to the FCC's ARMIS accounting system.²⁴ Qwest began developing the QPAP in the fall of 2000, at a time when 1999 ARMIS revenue data was the most current data available. Thus, Section 12 of the QPAP bases the revenue cap on 1999 ARMIS data. *Ex. 1217*. In the October 24, 2001 Notice, the Commission asked the parties to comment on the question of whether the cap should be based on 1999 ARMIS Net Revenue or more recent data.

53 The Report recommends the use of 1999 ARMIS data, finding that 1999 revenues are known, whereas revenue from any other year may create an unknown risk. *Report at 21-22*.

CLECs and Public Counsel

54 AT&T, WorldCom, and Public Counsel all assert that more current ARMIS data should be used to calculate the cap amount. *AT&T Comments at 43; WorldCom Comments at 4-5; Public Counsel Comments at 9*. During the hearings, WorldCom, AT&T, and Public Counsel agreed that the most current ARMIS data should be used even if the amount is less than the amount for 1999. *Tr. 5999-6001*.

Services in Connecticut, Memorandum Opinion and Order, CC Docket No. 01-100, FCC 01-208, ¶76 (rel. July 20, 2001) (*Verizon Connecticut Order*).

²⁴ See, e.g., *Bell Atlantic New York Order*, ¶436.

Qwest

55 In its initial comments, Qwest opposed any update to the 1999 ARMIS data stating that it agrees with the Facilitator that it is inherently speculative whether Qwest's local revenue will increase or decrease in future years. *Qwest Corporation's Response to Notice of Opportunity for File Comments at 3 (Qwest Initial Comments)*. In response to comments from the other parties, Qwest continues to oppose the use of more current ARMIS data and questions whether CLECs would still believe Qwest should use more current data if those results were less than the 1999 ARMIS results. *Qwest Rebuttal at 12*.

Discussion and Decision

56 We find that using current ARMIS data is important to achieving the FCC's goal of a plan that provides meaningful and significant incentive. Using the most current ARMIS data available provides a better match between the relative amount of revenue at risk and the prospective time period when the QPAP will be in operation. The CLECs and Public Counsel have stated that they do not object to current data even if it would result in a total amount at risk that is lower than in prior years. *Tr. 5999-6001*. We direct Qwest to update section 12 of the QPAP to reflect the use of current ARMIS data.

c. Raising or Lowering the Cap

57 The parties are in dispute over whether the revenue cap should stay constant or change over time. A cap that remains constant is referred to as a "hard cap," whereas a cap that can change over time is a "soft cap," or "procedural cap." The Report proposes a procedural type cap that would allow the 36 percent cap to increase by as much as 8 percent or decrease by 6 percent depending on Qwest's performance over two years. *Report at 18-20*.

AT&T

58 AT&T objects to the Facilitator's proposal, arguing that no party advocated the solution proposed in the Report, and that the standards for determining movement of the cap are too advantageous to Qwest. *AT&T Comments at 7-8*. Further, AT&T argues that the CLECs opting into the QPAP would be waiving their rights to all contractual remedies, and that the Facilitator's proposal could result in the denial of any remedies to CLECs. *Id. at 8*. If Qwest's performance is so poor that the cap must be increased, some CLECs will not receive any payments for the harm they suffer. *Id.* AT&T also objects to the Facilitator's comment that this proceeding will determine the "toll" that Qwest should pay for entry into the long distance market. *Id. at 6*.

WorldCom

59 WorldCom argues that the FCC has not approved any plan that allows for a decrease in the revenue cap, and urges the Commission to reject this part of the Facilitator's proposal. *WorldCom Comments at 4*. WorldCom proposes that the Commission retain the procedural increase in the cap proposed in the Report. *Id.*

Public Counsel

60 Public Counsel opposes the Facilitator's recommendations, arguing that the proposal would limit this Commission's ability to review Qwest's failure to conform to the QPAP or modify the amount of the cap. *Public Counsel Comments at 4-5*. Public Counsel also objects to lowering the cap. Public Counsel objects to the Facilitator's concerns for the need for predictability and how capital markets may view the QPAP, asserting that the purpose of the QPAP is to deter anti-competitive activity. *Id. at 6*.

Qwest

61 Qwest initially proposed a hard cap, but accepted the Facilitator's proposal for a procedural cap and incorporated the mechanism into the red-lined QPAP filed with the Commission in response to Bench Request No. 37. *Ex. 1217, §12.2; see also Qwest Rebuttal at 11*.

62 Qwest defends the Facilitator's reasoning in establishing a flexible cap. However, Qwest states "if the CLECs are opposed to a flexible cap, Qwest has no objection to a flat 36 percent cap." *Qwest Rebuttal at 11*.

Discussion and Decision

63 We are concerned with the Facilitator's recommendation to allow the cap to move up or down. No party to the proceeding made such a proposal either in testimony or briefs. We agree with Public Counsel's concerns that the Facilitator's proposal may unnecessarily restrict our ability to review the operation of the QPAP. We find that Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs. Qwest must revise section 12 of the QPAP accordingly.

2. Tier 1 Payment Escalation

64 Tier 1 payments are payments Qwest makes to individual CLECs when Qwest fails to meet performance standards when providing service to a particular CLEC. *Ex. 1217, §6.0*. Section 6.2.2 of Qwest's original QPAP provides that if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure automatically escalates. *Ex. 1200, Table 2*. For example, if

Qwest provides non-conforming performance in May, June, and July, the payment to the CLEC would increase each month as provided in Table 2. The Report recommended that after six consecutive months of payment escalation, no further escalation should be required, and that payments for subsequent consecutive failures should be capped at the six-month payment level. *Report at 44-45*. The Facilitator was not persuaded by CLEC arguments that a cap on payments would create a less effective incentive to perform. *Id. at 44*. Further, the Facilitator asserted that the payments would be uneconomical if not capped. *Id. at 45*.

AT&T

65 AT&T opposes the six-month cap on payment escalation, asserting that the Colorado Hearing Examiner and the Utah Staff both rejected a cap on escalation. *AT&T Comments at 23-24*. AT&T argues that escalation payments without a cap would deter Qwest from strategically paying penalties and slowing competition instead of meeting the performance measures. *Id. at 24*. AT&T takes exception to the Facilitator's rationale for a six-month cap, noting that the Facilitator relied on factors that were not based on any evidence of record. *Id. at 25-26*.

WorldCom

66 Like AT&T, WorldCom opposes the six-month cap on payment escalation. WorldCom objects to the Facilitator's finding that if Qwest continued to fail to perform after six months, the CLECs could bring the issue to the state commission. *Id. at 10-11*. WorldCom argues that this goes against the FCC's criteria that performance assurance plans provide a self-executing mechanism to limit litigation and appeal. *Id. at 11*. WorldCom notes that the Utah Staff recommends against a cap on the basis that the performance measures are the same as those developed in the ROC OSS test and that Qwest should be able to meet those measures. *Id. at 10, citing Utah Staff Report at 42*. Further, WorldCom notes that the Colorado Hearing Examiner decided against a freeze on escalated payments. *Id., citing November 5, 2001, Colorado Decision at 22*.

Joint CLECs

67 The Joint CLECs are opposed to the six-month cap on payment escalation, stating that "Qwest produced no evidence to demonstrate that QPAP payments at the six-month level are sufficient to provide Qwest with the financial incentive to improve its performance in successive months." *Joint CLEC Comments at 22*.

Public Counsel

68 Public Counsel asserts that escalating payments beyond six months will provide appropriate, meaningful and significant incentive for Qwest to perform. *Public*

Counsel Comments at 17. Public Counsel recommends the Commission adopt the approach of the Colorado Hearing Examiner not to limit payment escalation. *Id.*

Qwest

69 Qwest asserts that no party has provided evidence demonstrating that unlimited escalation is necessary to ensure that Tier 1 payments are compensatory to CLECs, or to provide Qwest sufficient incentive to meet the QPAP's performance standards. *Qwest Rebuttal at 19.* Qwest notes that the Facilitator found that continued non-performance could be due to a standard not operating properly, rather than Qwest's failure to perform. *Id. at 18-19.* Qwest further argues that, without a cap, CLECs may be substantially overcompensated and would not have the incentive to invest in facilities-based competition. *Id. at 19-20.* In addition, Qwest asserts that the FCC has approved plans for the states of Texas, Kansas, Oklahoma, Arkansas, and Missouri that contain a six-month cap on escalation payments. *Id. at 20-21.*

Discussion and Decision

70 We believe the six-month cap on escalation payments is appropriate. We understand the CLECs' objections to the six-month cap, and their concern for creating sufficient incentive for Qwest to perform. However, we are also concerned with the prospect that Qwest could find itself in a financial dilemma caused by continually escalating payments. We must find the proper balance between providing the correct incentive for Qwest and assurance for the CLECs. Under Table 2 of the QPAP, payments made to CLECs will be very substantial at the sixth month of escalation. We believe that even with the six-month cap, Qwest should have sufficient incentive to meet the performance standards for measures contained in the plan. As noted elsewhere in this Order, we retain the authority to look at this issue during the biennial or six-month review processes should the circumstances warrant.

3. Duration/Severity Caps

71 Payment measures in the QPAP use various metrics to measure performance, such as percents, ratios, and time intervals. Payments for the failure to meet the performance standards are based on the number of occurrences, or orders placed by the CLEC. Payment amounts owed to CLECs are calculated by determining the degree to which actual performance--as measured by the performance metric--deviated from the standard and applying it to the number of orders placed by the CLEC.

72 The QPAP proposes that the amount of deviation between actual performance and the performance standard not be allowed to exceed 100 percent for purposes of calculating the amount owed to the CLEC. As a result, sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the

month for each qualifying product and sub-measure times the per payment amount. *Ex. 1217*. This cap is referred to as the duration/severity, or 100 percent, cap.

- 73 AT&T, the Joint CLECs, and Z-Tel opposed the cap during the Multi-state Proceeding. The Facilitator rejected their request stating:

What we have here is a need for arithmetic compromise to fit the quality of the data we have to work with under this measure. It is clear the CLECs, despite what look like arguments for mathematical purity, in fact propose merely a different sort of impurity. There is not a factual or logical basis for believing that it comes closer to ultimate reality than does the one Qwest proposed. Notably, methods like those proposed in the QPAP here exist in other plans examined by the FCC.

- 74 *Report at 69*. AT&T and Z-Tel proposed to remove the cap on payments for performance measures calculated as averages or means. The Report concludes that no change is necessary, because the CLECs did not present evidence addressing the number and length of distribution on delayed orders. *Id. at 70*.

AT&T

- 75 AT&T asserts that the Facilitator did not understand the CLECs' arguments concerning the "application of the per-occurrence measurement scheme for interval measurements, and then criticized the CLECs for not providing evidence to support an argument they never made." *AT&T Comments at 35*. AT&T explains that the CLECs assert that "the per-occurrence scheme should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to CLECs from the Qwest average monthly performance to itself." *Id. at 38*. AT&T asserts that the issue is whether or not payment occurrences should be capped at the number of CLEC orders. *Id. at 39*. AT&T argues that payment occurrences should not be capped, as such a cap would protect Qwest from its own poor performance to CLECs. *Id.* Finally, AT&T asserts that the CLECs' proposal is included in plans approved by the FCC. *Id.*

Joint CLECs

- 76 The Joint CLECs assert that it was inappropriate for the Facilitator to shift the burden of proof to the CLECs, since Qwest is the only party with such information. *Id. at 26*. The Joint CLECs argue that the recommendation lacks logical, factual, or legal support, since the Report recommends adoption of Qwest's proposal solely because the CLEC proposal was flawed. *Id. at 27*. The Joint CLECs recommend the Commission require Qwest to remove the cap on payments for duration measures. *Id.*

Qwest

77 Qwest asserts that the Facilitator's acceptance of Qwest's 100 percent limit on missing interval measurements has been accepted by the Utah Staff and the Colorado Hearing Examiner, and included in plans approved by the FCC. *Qwest Rebuttal at 33*. Qwest objects to the CLECs' rationale that the worse Qwest's performance is, the more Qwest should have to pay. *Id. at 34*. Qwest argues that payment occurrences should be capped to prevent CLECs being paid for orders that do not exist. *Id.*

Discussion and Decision

78 The concept of Qwest providing services to CLECs at parity with the services it provides to its own retail customers is key to the advancement of local service competition. Qwest's proposal is to make payments for its failure to provide service at parity up to the point where the CLEC has received a payment for non-performance for each order placed. Beyond that point, no matter how long it takes to provision service, Qwest argues that there should be no further compensation. The CLECs ask that the Commission remove the cap so that Qwest will have incentive to minimize any disparity in provisioning services between itself and CLECs. We agree with the CLECs and direct Qwest to remove the 100 percent cap from the performance measures calculated as averages or means contained in the QPAP.

79 Bench Request No. 42 directed Qwest to explain the apparent differences between the use of "parity value" in formulae used to calculate the number of misses for parity measures and the language in the QPAP explaining how misses are calculated for parity measures. Qwest responded that it had provided the formulae in response to Bench Request No. 37. *Ex. 1289*. Qwest's response indicates that there were no actual differences between the formulae and the intent of the language in the QPAP regarding the calculation of misses. *Id.* Nonetheless, we direct Qwest to clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term "parity value" so that there will be no confusion at a later date as to how the calculations are performed.

4. Tier 2 Payments

80 Tier 2 payments are payments made to the state of Washington when Qwest fails to meet certain performance standards. *See Ex. 1217, §7.0*. Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payment are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

81 The original QPAP required Tier 2 payments only after 3 consecutive months of non-performance. *Ex. 1200*, §7.3. The Report determined that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for any two months in any consecutive three-months “in any 12 month rolling period.” *Report at 43*. In addition, for Tier 2 measures with no Tier 1 counterpart, the Facilitator recommended that payments should escalate as provided for in the QPAP. *Id.*

AT&T

82 AT&T seeks clarification of the reference in the Report to Tier 2 payment escalation, noting that the QPAP does not include a provision for Tier 2 payment escalation. *AT&T Comments at 23*.

WorldCom

83 WorldCom opposes the findings in the Report and requests that the Commission require Tier 2 payments to be made in any month that Qwest fails to meet a Tier 2 performance measure. *WorldCom Comments at 9*. WorldCom also recommends that Tier 2 payments escalate by twice the prior month’s payment amount and be subject to a step-down function.²⁵ *Id.*

Public Counsel

84 Public Counsel opposes the Tier 2 payment trigger proposed in the Report as overly complicated. *Public Counsel Comments at 16*. Public Counsel recommends a more straightforward approach, in which Qwest would make a Tier 2 payment for each month of non-conforming performance. *Id.*

Qwest

85 Qwest argues that it is appropriate to allow a three-month correction period, because of the lag time involved in addressing continuing problems. *Qwest Rebuttal at 17*. Qwest explains that the Tier 2 payments work the same way in the Texas, Oklahoma, and Kansas plans. *Id.* Qwest argues that since those plans allow a longer correction period than the two-out-of-three month trigger proposed by the Facilitator, the shorter period would clearly be acceptable to the FCC. *Id.* With respect to the question of Tier 2 payment escalation, Qwest believes the Facilitator’s reference to payment escalation is simply a mistake. *Id. at 18*.

²⁵ A step-down function refers to decreases in escalated monthly payment levels in months when performance conforms with the standards.

Discussion and Decision

86 The purpose of Tier 2 payments is to provide sufficient incentive for Qwest to continue meeting its performance obligations once it receives section 271 approval. We question whether sufficient Tier 2 incentives will exist if Qwest can fail to meet the performance standards one-third of the time or more without consequence. We are puzzled by Qwest's reasoning for the Tier 2 payment lag as due to "lag time involved in addressing continuing problems." Given that the focus of the ongoing OSS test is to identify and correct problems with Qwest's OSS systems, it seems doubtful that Qwest could receive our approval or the FCC's section 271 approval in the presence of "continuing problems" with the OSS systems. Qwest must, therefore, modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.

87 With respect to the question of Tier 2 payment escalation, we are inclined to believe that the Facilitator's reference to payment escalation was intended to refer to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens. We therefore reject WorldCom's request to escalate Tier 2 payments for consecutive misses. Should the issue of escalating Tier 2 payments prove to be problematic, the parties may raise the issue during the six-month review process.

5. Collocation Payments

88 The Report requires Qwest to include in the QPAP an agreed-to proposal for determining collocation payments. *Report at 55-56.* Qwest modified section 6 of the red-lined QPAP to show proposed payments relating to the provision of collocation. *Ex. 1217, §§6.3, 6.4; Table 3.* In addition to the requirements in the QPAP, state rules establish standards and payments for collocation provisioning in Washington State. *WAC 480-120-560.* We requested comment from parties as to how we should address the differences between the proposed QPAP collocation standards and payments, and the standards and payments contained in WAC 480-120-560.

AT&T

89 AT&T asserts that it sees no reason why the collocation standards in WAC 480-120-560 should not apply to the QPAP. *AT&T Comments at 42.*

WorldCom

90 WorldCom asserts that if collocation standards in Washington state rules and the QPAP differ, the Commission should adopt the more stringent standards. *WorldCom's Response to Commission Questions at 1.* WorldCom states that for forecasted collocations, the Washington rule allows 77 days while the collocation PID

standard in the QPAP provides for a 90-day period. *Id.* WorldCom requests that the Commission modify the QPAP to incorporate the Washington rule. *Id.* at 2.

Qwest

91 In initial comments, Qwest states that its Washington SGAT incorporates specific collocation standards and remedies, based on WAC 480-120-560, in section 8.4.1.10. *Qwest Initial Comments* at 3. Qwest argues that to maintain two distinct conflicting standards and remedies in the same contract would be inappropriate. *Id.* Qwest proposes replacing the collocation delayed installation provision in section 6.3 of the QPAP with the terms in section 8.4.1.10 of the SGAT, and eliminating the duplicative SGAT section. *Id.* at 2-3.

92 In reply comments, Qwest objects to AT&T and WorldCom's proposals. *Qwest's Reply to Parties' Comments on Commission Questions* at 2. Qwest asserts that CLECs should elect their remedies. *Id.*

Discussion and Decision

93 The CLECs request that the Commission incorporate the collocation rule, WAC 480-120-560, into the QPAP. Qwest proposes to adopt the payment portion of the collocation rule into the QPAP and use the provisioning intervals contained in performance measures CP-2 and CP-4, which are different than the provisioning times contained in the rule. We agree with the CLECs' request to incorporate the collocation rule into the QPAP. Qwest must modify the QPAP to reflect that the CP-2 and CP-4 business rules are applicable only to matters not addressed in WAC 480-120-560. In addition, we intend that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

6. Low Volume Critical Values

94 Section 5.1 of the original QPAP contains the critical Z values that are used for statistical testing.²⁶ *Ex. 1200.* Qwest initially proposed a critical Z value of 1.65 to be used for all CLEC volumes. The PEPP collaborative produced a partial agreement to use a critical Z value of 1.04 for low volume LIS trunks, and DS-1s and DS-3s that are UDITs, resale, or unbundled loops, and higher critical Z values for higher volumes. The Facilitator considered and rejected a request by WorldCom and Z-Tel to use the 1.04 critical Z value for all services with low volumes. *Report* at 64.

WorldCom

²⁶ The critical Z value is a statistical measure used to determine the point at which Qwest fails to meet a performance measure.

95 WorldCom notes that there was only partial agreement in the PEPP collaborative because WorldCom and Z-Tel did not agree with the proposal. *WorldCom Comments at 23*. WorldCom asserts that it is important to balance Type I and Type II errors. *Id.* WorldCom further argues that to support larger critical values at higher sample sizes, at a minimum, the 1.04 critical value for sample sizes 1-10 should apply to all services and not be limited to only the few listed in Qwest's proposal. *Id. at 23-24*. WorldCom recommends that the Commission reject the Report's recommendation and order that the QPAP apply the lower value of 1.04 to all low volume services. *Id. at 24*.

Qwest

96 In response, Qwest states that "the use of the 1.645 versus the 1.04 critical value for the specific calculations cited by WorldCom was a negotiated issue that reflected the 'give and take' process among the parties." *Qwest Rebuttal at 32*. Qwest argues that the Commission should accept the agreement from the collaborative and reject WorldCom's proposal. *Id.*

Discussion and Decision

97 The Report explains that, under the negotiated agreement, the use of the lower 1.04 critical value would benefit CLECs in the case of 1,519 measures and that in return, the higher critical Z values would apply to the benefit of Qwest in 1,917 cases, or "roughly the same number of parity measures." *Report at 64*. The Report finds that the proposal to extend the use of the 1.04 value to all services would destroy that balance by applying the lower 1.04 value to over 10,000 tests. *Id.* We note that the negotiated proposal, while it did not include all the parties in this proceeding, included a majority of the participants. We agree that there is no reason to change the critical Z values, and, therefore, reject WorldCom's proposal.

7. Exclusions from the Cap on Payments

98 Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state. *Ex. 1217*. Public Counsel argues that payments made by Qwest to uphold the integrity of the QPAP should be excluded from the caps. These include payments for late reporting and interest payments for late payments or underpayments. *Public Counsel Comments at 9*. Qwest agreed during the oral argument that payments made as a result of late reporting should be excluded from the cap. *Tr. 5998*. We agree that payments made to uphold the integrity of the QPAP should be excluded from the cap and direct Qwest to revise section 12 to reflect this decision.

8. Carry-Forward Provision

99 A carry-forward provision would address the circumstance where Qwest's payments to CLECs and the state reach a monthly or annual cap, and payments are still owed to CLECs or the state, but may not be paid due to the cap on payments. A carry-forward provision would allow any payments owed from any month the cap is reached to be paid in subsequent months when the cap is not reached. Qwest's proposed QPAP does not include such a provision.

100 The Facilitator rejected Qwest's proposal for monthly caps, and instead proposed a means of equalizing payments to CLECs when the annual cap is reached. *Report at 19-20, 62.* Qwest has included this proposal in its QPAP. *Ex. 1217, §12.3.*

Public Counsel

101 Public Counsel strongly recommends that if the Commission determines that the QPAP should have a revenue cap, the Commission should require Qwest to include a carry-forward mechanism to ensure that CLECs receive payments due them but not paid because of the cap. *Public Counsel Comments at 8.* Public Counsel argues that such a provision will ensure that Qwest has the appropriate incentive not to provide inferior service once the cap is reached. *Id.* Public Counsel recommends the Commission require Qwest to include in section 12 of the QPAP language based on section 11.3 of the proposed CPAP. *Id. at 8-9.*

Qwest

102 Qwest did not respond to this issue in comments filed with the Commission, nor was it discussed during the hearing.

Discussion and Decision

103 This Order determines that the QPAP must include a cap, but does not adopt the Facilitator's recommendation to allow the cap to move up or down. Section 12.3 of Qwest's proposed QPAP sets forth the Facilitator's recommended process for equalizing payments to CLECs in the event the annual cap is reached. *Ex. 1217.* If the monthly cap²⁷ is reached in any given month, but the annual cap is not exceeded, Qwest would not be required to make full payment to the CLECs for the month where the cap was reached. We decline to adopt Public Counsel's recommended carry-forward provision for the monthly cap because Public Counsel has not provided sufficient justification at this point in time. (Our review of the monthly mock payment reports filed by Qwest shows there is little likelihood that the monthly cap

²⁷ The monthly cap in section 12.3 is not a cap on payment per se, but a calculation of the annual cap on a cumulative monthly basis to track how close Qwest is in reaching the annual cap.

will be reached. *See Ex. 1223.*) If the circumstances warrant, parties may request that the Commission reconsider this issue at a later date, including during the biennial or six-month reviews.

9. Service Quality Payments

104 Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for “the same underlying activity or omission” under a Commission order or service quality rules. The section limits any payments Qwest must make to the Commission to the payments it would make under the QPAP. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for “the same underlying activity or omission . . . under any other contract, order or rule.” *Ex. 1217.*

Public Counsel

105 Public Counsel argues that nothing in the plan should diminish the Commission’s jurisdiction over Qwest’s service quality. *Public Counsel Comments at 14-15.* Public Counsel argues that the Bell Atlantic New York plan includes a provision that does not limit state commission authority over service quality. *Id.* Public Counsel recommends that the Commission require Qwest to delete Section 13.8, and include the following: “Nothing in the Performance Assurance Plan can or will diminish Commission jurisdiction over Qwest service.” *Id.*

106 Similarly, Public Counsel recommends the Commission modify section 12.1 of the QPAP to retain Commission authority over service quality by including the following language: “Payments made by Qwest for retail service quality performance are not included in the cap on payments.”

Qwest

107 Qwest argues that sections 13.8 and 12.1 were designed to avoid double payment for the same activity and are consistent with plans adopted in Texas, Kansas, and Oklahoma. *Qwest Rebuttal at 16.* Qwest asserts that the QPAP is not intended to “deprive the Commission of existing jurisdiction to address either wholesale or retail performance issues,” but is designed to avoid paying twice for failing to meet the same standard. *Id.*

Discussion and Decision

108 We note that the proposed CPAP provides that “any penalties imposed by the Commission” are not subject to the cap. *CPAP, §11.2.* The CPAP also provides a process for Qwest to dispute any payments under state service quality rules that it perceives as duplicate payments under the plan. *Id., §16.8.*

109 At the heart of this issue is the Commission's independent authority to review Qwest's service. While Qwest may argue that the CLECs elect remedies by adopting the plan to the exclusion of all other alternatives, the Commission does not relinquish any authority, nor is it required to do so in approving the QPAP. Qwest must modify sections 13.8 and 12.1 to be consistent with section 11.2 of the CPAP to allow the Commission to assess penalties, where necessary, to address service quality issues, but to allow Qwest to dispute any payments it believes are duplicate.

D. CLEARLY ARTICULATED AND PREDETERMINED MEASURES

110 One of the characteristics the FCC considers in evaluating a performance assurance plan is whether a plan has clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance. Section 3.0 of the QPAP explains that the performance measurements used in the QPAP are included in Attachment 1. *Ex. 1217*. The QPAP further explains that "each performance measurement identified is defined in the Performance Indicator Definitions ("PIDs") developed in the ROC Operation Support System collaborative, and which are included in the SGAT at Exhibit B." *Id.* §3.0.

1. Adding UNEs and Performance Measures to the QPAP

111 During the Multi-state Proceeding, several parties requested that other performance measurements be included in the QPAP, including special access circuits, canceled orders, diagnostic UNEs (including EELs, line sharing, and sub-loops), cooperative testing, address due-date changes, pre-order inquiry time-outs, change management measures, software test release quality, test bed measurement, and missing status notifiers. The Report rejected the addition of special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers. *Report at 47-52, 56-58*. For Change Management, the Report found that Qwest has already added PO-16 and GA-7 to the QPAP, and for the diagnostic UNEs, the Report found that EELs, line sharing, and sub-loops should be added to the QPAP as soon as practicable. *Id. at 48, 50-51*.

a. Special Access Circuits

112 The Report denies WorldCom's and the Joint CLEC's request to include special-access circuits in the performance measurements in the QPAP. *Report at 57-58*. The Report finds that "the overwhelming majority of special-access circuits at issue here were purchased under federal tariff." *Id. at 57*. The Report finds that the FCC has jurisdiction over the issue, not the state. *Id.* The Report further states that Qwest has been ordered to ease its restrictions on converting special-access circuits to EELs, and

that if CLECs elect to do so, they will be protected under interconnection agreements.
Id.

WorldCom

- 113 WorldCom requests that the Commission order Qwest to include performance measures for special-access services in its QPAP for the state of Washington. *WorldCom Comments at 22.* WorldCom argues that the Facilitator erred in rejecting the inclusion of special access in the QPAP on the basis that states did not have jurisdiction over special access circuits since over 90 percent of such circuits are purchased from the FCC tariff. *Id. at 17.* WorldCom relies on this Commission's decision in the *Special Access Order*,²⁸ as well as decisions by the FCC, and the states of Texas, New York, Massachusetts, Indiana, and Colorado requiring performance standards for special access. *Id. at 17-21.*

Joint CLECs

- 114 The Joint CLECs oppose the Facilitator's decision, noting that Qwest never refuted the testimony that CLECs "heavily rely on Qwest private line and special access circuits to provide local exchange service to their customers." *Joint CLEC Comments at 11.* The Joint CLECs also claim that Qwest never addressed their arguments that "CLECs are just as dependent on timely and proper provisioning by Qwest of special access as are CLECs that purchase equivalent high capacity services on an unbundled or resale basis." *Id.* The Joint CLECs assert that their inability to provide UNEs and special access circuits on the same facility, and Qwest's restrictions on converting special access circuits to EELs, results in a lack of alternatives to using special access circuits. *Id. at 12-13.*
- 115 The Joint CLECs point out that the Report also recommends that EELs not be subject to any payments and that high capacity loops be subjected to payment levels in some cases significantly below the profits on retail services provisioned with the facilities. *Id. at 16.* The Joint CLECs assert that these recommendations, if adopted, would exclude any effective performance assurance for high capacity circuits in the QPAP. *Id. at 16-17.* The Joint CLECs request that the Commission require Qwest to include such circuits subject to the same payment obligations applicable to comparable UNEs. At a minimum, the Joint CLECs request that the Commission require Qwest to measure performance for special access circuits and determine whether to apply payment obligations at the next QPAP review opportunity. The Joint CLECs argue that a QPAP "that does not provide an effective self-executing remedy for Qwest's

²⁸ *In re the Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, WUTC Docket No. UT-991292 (May 18, 2000) (*Special Access Order*).

failure to provision high capacity circuits cannot be in the public interest” by excluding incentives to provide nondiscriminatory service. *Id. at 17.*

Qwest

116 Qwest asserts that “the Commission lacks even the jurisdiction to address performance issues relating to the 97 [percent] of Qwest’s special access circuits that are purchased from the interstate tariff.” *Qwest Rebuttal at 23.* Qwest also argues that to the extent the Commission imposes special access obligations or remedies on Qwest, they would directly interfere with the FCC’s authority to govern matters within its jurisdiction and would be inconsistent with the filed rate doctrine. *Id. at 24.* Qwest also states that the FCC has expressed serious legal and policy concerns about including special access circuits within the scope of section 251 c (3) – unless the facilities involve significant local exchange service by CLECs, in which case they may be converted to UNEs and would be covered by the QPAP. *Id. at 26.* Finally, Qwest notes that on November 19, 2001, the FCC issued a Notice of Proposed Rulemaking and requested comments on whether the FCC should adopt a select group of performance measurements and standards for evaluating ILEC performance in provisioning of special access services. *Id. at 27-28.*

Discussion and Decision

117 As a threshold matter, Qwest asserts that the Commission does not have authority to order special-access reporting because it does not have jurisdiction over interstate services. We have previously considered this argument in Docket UT-991292, a complaint against Qwest’s predecessor U S WEST regarding the provision of access services. In the *Special Access Order* in that proceeding, we stated:

The Commission agrees with the parties that the FCC retains sole jurisdiction over the enforcement of rate terms in tariffs filed pursuant to federal statute. However, the Commission rejects U S WEST’s contention that its provision of intrastate services under federal tariffs within the 10% rule is totally free of state control in any manner. The FCC has not preempted state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer’s election to take service under a federal tariff per the 10% rule preempts all state regulatory authority, we decline to so rule. The significance of intrastate traffic to the public and to the economy of the state, and the Commission’s need to ensure that intrastate services are free from discrimination and barriers to competitive entry, require us to assert jurisdiction when it is lawful for us to do so.²⁹

We assert our jurisdiction in this proceeding.

²⁹ *Special Access Order*, ¶28.

118 The Joint CLECs use special access circuits in the provisioning of facilities-based local exchange networks. The Commission encourages the development of competition in Washington by facilities-based providers. We are concerned with the potential lack of any incentive for Qwest after the grant of section 271 authority to provision and repair special-access circuits used by CLECs in a timely manner that provides CLECs a meaningful opportunity to compete. While Qwest asserts that CLECs can use EELs to perform the same function as special-access circuits, EELs are, as a practical matter, not available in Washington. *Tr. 6171; see also Joint CLEC Comments at 13.*

119 We find that the record in this proceeding supports a requirement that Qwest, at a minimum, report its monthly provisioning and repair intervals for special access circuits. We understand that Qwest is not currently able to provide such reports. However, the Special Master in Colorado recently issued a supplemental report in which he sets forth a process for the Colorado commission to follow that would result in developing reports for special access.³⁰ Rather than embark on a separate, duplicative process for special access reporting, we direct Qwest to begin filing monthly special access reports for Washington at the same time it begins special access reporting to the Colorado commission.

b. Adding New UNEs

120 Several new UNEs were created as a result of the *UNE Remand Order*,³¹ including EELs, sub-loops, and line sharing. A standard has not yet been defined for these UNEs because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as “diagnostic UNEs” or TBD (to be decided). The Report found that Qwest should add EELs, sub-loops, and line sharing to the QPAP payment structure “as soon as practicable.” *Report at 48.*

WorldCom

121 WorldCom argues that the recommendation in the Report is too vague. *WorldCom Comments at 11.* WorldCom requests that the Commission strengthen the recommendation in the Report and order that the EEL, line sharing, and sub-loop measures become part of the QPAP payment structure immediately upon being assigned performance standards. *Id. at 12.* WorldCom objects to Qwest’s statement

³⁰ *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Supplemental Report and Recommendation of the Special Master to the Public Utilities Commission of the State of Colorado, CPUC Docket No. 01I-041T, at 12-17 (February 19, 2002).

³¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*).

that it will not automatically include UNEs currently designated as diagnostic or TBD in the QPAP once standards are determined and that further additions should be addressed in the six-month review process. *Id.*

Joint CLECs

- 122 The Joint CLECs oppose the Facilitator's finding that there is insufficient experience with EELs to assign a standard, and recommend that the Commission require Qwest to establish a standard based on the provisioning and repair standards set forth in Qwest's Service Interval Guide. *Joint CLEC Comments at 9-11.*

Qwest

- 123 Qwest has committed to providing payment opportunities for EELs when the ROC collaborative determines standards for the UNE. *Qwest Rebuttal at 38.* During the hearings, however, Qwest stated that these measures should not be included into the QPAP automatically, but discussed at the six-month review. *Tr. 6189.*

Discussion and Decision

- 124 We are concerned that Qwest opposes any further additions of measures to the QPAP until the six-month review. We believe that the QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including EELs, sub-loops, and line sharing. The Regional Oversight Committee Technical Advisory Group (ROC-TAG)³² recently established a set of performance measures applicable to EELs that includes OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8. Qwest must provide payment opportunities in the QPAP for these measures as the standards are determined and not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.

c. Adding New Performance Measures

- 125 The CLECs request that the Commission order Qwest to establish several new performance measures in the QPAP, including PIDs for canceled orders, cooperative testing, and electronic order flow-through.

³² The ROC TAG consists of state commission staff, competitive local exchange carrier (CLEC) representatives, Qwest representatives, and other industry members. It has been active in the initial planning of the OSS test. The TAG collaboratively developed the Testing and Scoping Principles that will drive the testing effort. The TAG is also collaboratively developing the Performance Measurements for testing purposes, which are the same Performance Measurements used in the QPAP, and has had an extensive role in developing the Master Test Plan (MTP).

Joint CLECs

- 126 With respect to canceled orders, the Joint CLECs state that the Facilitator's Report erred in finding that the QPAP provides payments for orders that are delayed whether or not they are finally canceled, noting that Qwest's witness testified that Order and Provisioning measures only measure completed orders. *Joint CLEC Comments at 7-8*. The Joint CLECs request that the Commission require Qwest to include canceled orders among the orders eligible for payment for non-conforming performance in ordering and provisioning. *Id. at 8*.

Covad

- 127 Covad requests that Qwest be required to establish two new PIDs, a cooperative testing measure and a canceled order measure. *Verified Comments of Covad Communications Company on Qwest's Proposed Performance Assurance Plan at 41 (Covad Comments)*. Covad states that cooperative testing is the only method by which Covad can ensure that an xDSL-capable loop is delivered, and addresses Covad's ability to compete effectively and efficiently with Qwest. *Id.* Therefore, Covad argues that it is imperative that a cooperative testing measure be included in the QPAP. *Id.*

AT&T

- 128 AT&T requested during the hearing that the Commission include in the QPAP the electronic flow-through measure, PO-2(b), noting that the standard was currently at impasse and that AT&T has requested the ROC Steering Committee and Executive Committee to rule that PO-2(b) be included in the QPAP. *Tr. 6191-92*.

Discussion and Decision

- 129 Of the three new PIDs requested by CLECs, only one, electronic order flow-through (PO-2b) has been developed and standards agreed upon. We note that an electronic order flow-through measure is already included in the CPAP. We find that such a measure is important to a CLEC's ability to compete with Qwest. Therefore, we direct Qwest to add this measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.
- 130 With respect to the requests to establish PIDs for canceled orders and cooperative testing, we note that Qwest has not developed PIDs for these measures and that there is a ROC process for requesting new PIDs. Parties should use that process to pursue the development of new PIDs.

2. Changes to Measure Weighting

131 During the PEPP collaborative, the participants agreed to a scheme whereby performance measures were assigned high, medium, or low payment values depending on their relative importance to the parties. During the Multi-state Proceeding, AT&T proposed assigning higher payment amounts to certain “high-value” services. Qwest countered with an offer to accept the proposal if the CLECs agreed to move other performance measures to lower value categories. AT&T argued that Qwest’s proposal was unbalanced. The Facilitator found that since no other proposal was subsequently made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed. *Report at 53-54.*

WorldCom

132 WorldCom opposes the Facilitator’s decision, stating that it did not agree with Qwest’s counter-proposal to lower Tier 2 payment levels on certain measures because they are key provisioning and repair measurements that affect customer perception of new-provider performance. *WorldCom Comments at 13-14.* Citing a recent Michigan decision concerning SBC-Ameritech, WorldCom now proposes that the Commission require that all of Qwest’s measures have equal ranking. *Id. at 14-16.*

Joint CLECs

133 The Joint CLECs oppose the Facilitator’s decision, arguing that the record evidence does not support the finding that the original QPAP weighting was reasonable. *Joint CLEC Comments at 28.* The Joint CLECs point out that Qwest’s current DS-3 monthly rate in the FCC tariff for Washington is \$1,500, and that Qwest has proposed a rate of \$855 in the Part B UNE cost docket. *Id. at 29.* The Joint CLECs also note that the QPAP payment to the CLEC for not providing the DS-3 circuit is only \$150 and would not approach the monthly rate for the service until after five consecutive months of misses. *Id.* The Joint CLECs argue that payment levels that permit Qwest to continue to profit from retaining a retail customer while withholding facilities from competitors for five months should not be considered reasonable if the purpose of the payments is to ensure that Qwest provisions those facilities on a timely basis. *Id.* The Joint CLECs request that the Commission reject the Report’s recommendation and require Qwest to increase the payment levels for high capacity loops and transport, without corresponding decreases in payments for other services. *Id. at 32.*

Qwest

134 Qwest states that it is unclear what WorldCom is proposing in urging that all measures be weighted equally, but that the proposal appears to refer to actions in other proceedings which are not a part of this record. *Qwest Rebuttal at 22.* With respect to the proposal for higher payment for higher-value services, Qwest notes it

did not disagree with the principle, but pointed out that services costing less should then have lower associated payment amounts. *Id. at 21*. Qwest asserts that it introduced a proportionality analysis demonstrating that the AT&T proposal would create greater disparity than the Qwest proposal. *Id.* Finally, Qwest states that the Joint CLECs argue that existing high capacity loop and transport payments should be increased and continue to ignore the argument that payments for lower value services should be lowered commensurately. *Id.*

Discussion and Decision

135 We reject the Facilitator's decision to retain the payment levels for high-value services at the levels initially proposed by Qwest. In this particular case, we find that higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service, because they more closely correlate with one another. Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

E. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE AS IT OCCURS

1. The Six-Month Review Process

136 Section 16 of Qwest's original QPAP provides a means for amending the performance measurements in the plan at six-month intervals. *Ex. 1200, Attachment 1, §16*. The scope of Qwest's proposed six-month review process includes additions, changes and deletions of performance measurements, changes to benchmark standards, changes from benchmark to parity standards, changes to the classification of measurements from high, medium, or low, and Tier 1 to Tier 2, and changes in payment levels. *Id., §16.1*. Qwest's proposed QPAP requires Qwest's approval before any changes are made. *Id.*

137 The Facilitator recommended three changes to the proposed six-review process: (1) Provide for normal SGAT dispute resolution for disagreements regarding the addition of new measures to the plan (*Report at 62*); (2) Recognize and support a multi-state review process to resolve QPAP disputes, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments (*Id. at 42, 62*); and (3) Provide for biennial reviews of the continuing effectiveness of the QPAP, that will incorporate all issues discussed during preceding six-month reviews (*Id. at 62*). The Facilitator did not recommend changing either Qwest's "veto power" over any change in the plan, or the scope of the six-month review process, finding that Qwest requires such control to limit its financial liability under the plan. *Id. at 61*. The parties remain in dispute over these issues.

138 Qwest has modified its QPAP to reflect the Facilitator's recommendations, including developing language anticipating that the nine states participating in the Multi-state Proceeding would engage in a common review. *Ex. 1217, §16.1.*

AT&T

139 AT&T objects to the control Qwest has retained over changes to the plan, and also objects to the limited scope of changes to the plan. *AT&T Comments at 32-35.* AT&T argues that the proposed CPAP and the Utah Staff Report both leave to the state Commission, not Qwest, the decision of whether to make changes to the QPAP. *Id. at 33.* AT&T recommends the Commission adopt the language from section 18.6 of the proposed CPAP which would allow parties to suggest more fundamental changes to the plan, but only to address exigent circumstances. *Id.* Finally, AT&T objects to findings in the Report comparing the Texas plan and the QPAP, noting that the Texas plan provides for mutual agreement of the parties before changes are made to the plan. *Id. at 34.*

WorldCom

140 WorldCom opposes the requirement that Qwest agree before any changes can be made to the plan and opposes the limited scope of the six-month review. *WorldCom Comments at 22.* WorldCom requests the Commission include language in the QPAP similar to that in the Texas or Colorado plans. *Id. at 22-23.*

Public Counsel

141 Public Counsel objects to the Report's conclusion that Qwest must retain control over changes to the QPAP in order to limit Qwest's financial exposure. *Public Counsel Comments at 12.* Public Counsel argues that to deter anti-competitive behavior, and to create appropriate incentives, the QPAP should provide the Commission with authority to make changes. *Id. at 12-13.* Public Counsel strongly recommends modifying the QPAP to reflect that the Commission should retain the authority to modify the QPAP. *Id.*

Qwest

142 Qwest asserts that the Commission lacks authority to impose the plan on Qwest, and therefore does not have any authority to subsequently modify it. *Qwest Rebuttal at 30.* Qwest has challenged the Colorado and Utah plan proposals giving the state Commission authority to unilaterally amend the plan on the grounds that it is prohibited by state or federal law. *Id. at 29.* Qwest insists that its proposed plan and the Facilitator's recommendations are no different on this point than the plan approved in Texas. *Id. at 31.* Qwest states that "the FCC has recognized that an effective plan should allow the parties to modify and improve the plan's performance

metrics as necessary and that state commissions can and should have a prominent role in such improvements.” *Id.* However, Qwest denies that the FCC has allowed state commissions the sole authority to make changes to a performance plan. *Id.*

Discussion and Decision

a. Commission Authority

143 We disagree with Qwest that the Commission has no authority under state or federal law to order Qwest to amend the QPAP during the six-month review process. The Commission has broad authority to regulate the rates, services, facilities and practices of telecommunications companies in the public interest, and to promote competition in the provision of telecommunications services.³³ In addition, section 261(c) of the Act provides:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the state’s requirements are not inconsistent with this part or the [FCC’s] regulations to implement this part.

144 Section 252(f) of the Act provides that a Bell Operating Company “may prepare and file with the state commission a statement of generally acceptable terms and conditions.” The SGAT is also a “voluntary” filing, yet Qwest has not disputed the Commission’s authority to order changes to the SGAT. Qwest intends to incorporate the QPAP into the SGAT as Exhibit K.

145 Finally, Qwest intends to offer the QPAP as evidence in its section 271 application that local exchange markets in Washington will remain open to competition after it receives section 271 authority from the FCC. The FCC expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.³⁴ Qwest acknowledges this. *Qwest Rebuttal at 31.* Qwest’s insistence on a unilateral right to reject any changes to the plan precludes any prominent Commission role in overseeing the plan.

146 Having reviewed the Texas plan, the CPAP, the Utah Staff Report, and recent orders from Wyoming and Montana,³⁵ we agree with the parties that Qwest must modify the

³³ *POWER v. Utilities and Trans. Comm’n*, 104 Wn. 2d 798, 808, 711 P.2d 319 (1985); RCW 80.01.040(3); RCW 80.04.110; RCW 80.36.080; RCW 80.36.140; RCW 80.36.160; RCW 80.36.170; RCW 80.36.180; RCW 80.36.186; and RCW 80.36.300.

³⁴ *Verizon Pennsylvania Order*, ¶¶127-32.

³⁵ *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming’s Participation in a Multi-state Section 271 Process, and Approval of its Statement of Generally Available Terms*, First Order on Group 5A Issues,

QPAP to allow the Commission authority to determine whether changes ought to be made to the QPAP. Qwest must amend section 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement," and add the following: "After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes."

b. Scope of Changes to the QPAP

147 With respect to the question of the scope of six-month reviews, we note that neither Qwest, the CLECs, or the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington. For this reason, we believe it would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan. However, the Commission is concerned that the six-month review process not become a forum for relitigating the essential terms of the plan. We believe the six-month review should focus on fine-tuning the performance metrics delineated above, while the other plan elements may be reexamined at the biennial review. However, consistent with the terms of section 18.7 of the CPAP, we will permit parties to request that the Commission review other issues if they can demonstrate that exigent circumstances exist. In addition, the Commission itself may identify issues for review. Qwest must modify section 16.1 to include the following language: "Parties or the Commission may suggest more fundamental changes to the plan, but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review."

c. Multi-state Review Process

148 The Facilitator's Report envisions a multi-state review process for the six-month and biennial reviews, and a special fund that will cover the cost of the multi-state process. *Report at 62.* We support, in part, the Facilitator's proposal for both a six-month and biennial review process. We support the concept of a multi-state process because of the efficiencies and administrative convenience that joint reviews can provide to the states. However, we are not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's proposed plan. *Ex. 1217, §§16.1, 16.2.* We discuss separately below the issue of the Special Fund and contributions from Tier 1 and Tier 2 payments proposed in the QPAP.

Public Service Commission of Wyoming Docket No. 70000-TA-00-599 (Record No. 5924) (Jan. 30, 2001)(Wyoming QPAP Order); *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings, Montana Public Service Commission Utility Division Docket No. D2000.5.70 (Feb. 4, 2002) (*Montana Preliminary QPAP Report*).

149 As noted in the recent Montana and Wyoming orders, the multi-state review process is still under development.³⁶ We believe it is this Commission's responsibility to consider any changes that need to be made, to ensure the effectiveness of the QPAP, and to resolve any disputes that may arise from its operation. Further, the ROC TAG is currently developing a post-271, long-term PID administration and review process. We prefer to wait and see how this process evolves before agreeing to a specific multi-state review process for the six-month and biennial reviews. We therefore will defer our decision on participation in any multi-state six-month review or biennial review process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review no later than 60 days after FCC approval of Qwest's application for section 271 authority.

150 Qwest must revise sections 16.1 and 16.2 to refer only to this Commission. Similar to the preliminary decision made in Montana, Qwest must include new language providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews and developing a process whereby the multi-state group would have the authority to act on the Commission's behalf.³⁷ Qwest must also delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes; the Commission will conduct the six-month review process and resolve any disputes between the parties.

d. Response to Bench Request No. 39

151 In Bench Request No. 39, we asked Qwest for the basis of underlying language in section 16.1 that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was less or greater than anticipated. In response, Qwest explained that the intent of the language was to provide a means to change the low, medium, or high designation of a performance measure if the measure turns out to be of greater or lesser importance than expected. *Ex. 1286*. We agree that payment levels for measures may need to be adjusted during a six-month review. However, we are concerned that relying solely on the volume of data points for that determination may unduly limit the scope of review. Causes may exist for changes to payment levels that are not related to the volume of data points. For instance, the volume of data points for a measure may turn out to be as expected, but Qwest's performance for the measure may not. In such a case, if volume were a constraint, the Commission would not be able to refocus incentives in the six-month review even if a new focus were warranted. Qwest must, therefore, remove the reference to the volume of data points from section 16.1.

³⁶ *Wyoming QPAP Order*, ¶13; *Montana Preliminary QPAP Report* at 35.

³⁷ *Montana Preliminary QPAP Report* at 35.

2. The Special Fund - Use of Tier 1 and Tier 2 Payments for Reviews and Audits

152 The original QPAP provides for payment to the state in the form of Tier 2 payments to be used for any purpose “that relates to the Qwest service territory that may be determined by the State Commission.” *Ex. 1200*, §7.5. Section 7.5 provides that the payments will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments. *Id.*

153 The Report recommends certain changes to the language in section 7.5, expanding state power over the use of the payments. *Report at 41-42*. The Report also recommends that one-third of Tier 2 payments and one-fifth of the escalated portion of Tier 1 payments should be placed into a special fund to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration. *Report at 42*.

154 Qwest has modified the QPAP to include this recommendation. *See Ex. 1217*, §11.3. Under QPAP section 11.3, the Special Fund would be an interest-bearing escrow account established by Qwest. Any Tier 1 payments to the Special Fund not used during a two-year period would be returned to CLECs. *Id.*, §11.3.2. To the extent that Tier 1 and Tier 2 funds are not sufficient, Qwest will contribute funds to the Special Fund. *Id.*, §11.3.3.

AT&T

155 AT&T disagrees with the creation of a funding system that uses Tier 1 payments, as no party made such a proposal during the proceeding. *AT&T Comments at 21-22*. Noting that CLECs already pay state taxes, regulatory fees and/or certification fees, AT&T believes that only Tier 2 funds should be used to fund future administration of the QPAP. *Id.*

WorldCom

156 WorldCom asks the Commission to reject a funding mechanism that uses a portion of CLEC Tier 1 payments to support state commission activities. *WorldCom Comments at 7-8*. WorldCom argues that CLEC payments are insufficient to compensate CLECs when Qwest provides poor wholesale performance, and that the recommendation in the Report to divert a portion of Tier 1 funds adds “insult to injury.” *Id.*

Joint CLECs

157 The Joint CLECs oppose the use of Tier 1 funds for future administrative costs of the QPAP, noting the lack of legal or evidentiary support on the record. *Joint CLEC Comments at 40-41*. In addition, the Joint CLECs note that Qwest would make no

contribution to the Special Fund or to the QPAP's administration. The Joint CLECs assert that such a proposal lacks any fundamental fairness or pretense of neutrality or nondiscrimination. *Id. at 41*. The Joint CLECs stated in hearing that since the Commission has not indicated what it anticipates doing in the six-month review or audit processes, the question of funding is better left for a future proceeding. *Tr. 6029*.

Public Counsel

- 158 Public Counsel recommends that Tier 2 funds be used to cover the costs of auditing and reviewing Qwest's performance under the QPAP, and that any remaining funds be used to enforce "the pro-competitive provisions of the Act as well as consumer education and protection." *Public Counsel Comments at 15*.

Qwest

- 159 Qwest asserts that it supports common administrative efforts, and that contributions to the fund must be consistent across the board if a collaborative approach is to work. *Qwest Rebuttal at 16-17*. Qwest further argues that the Tier 1 payment contribution is entirely appropriate, as CLECs will benefit from the collaborative approach. *Id.*

Discussion and Decision

- 160 As we discuss, above, concerning the six-month review process, and below concerning the audit process, we decline to commit to a specific multi-state process at this time. We will defer the issue of our participation in any multi-state process until after the FCC considers Qwest's application for section 271 authority. Similarly, we will defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation level in a multi-state process. Any later decision to use Tier 1 funds will apply on a going-forward basis.
- 161 Consistent with our decision concerning participation in multi-state processes, we direct Qwest to modify the QPAP to include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.
- 162 Until we determine whether we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington

State into that account. We will review the proper placement of these funds based on our decision whether to participate in a multi-state process.

F. SELF-EXECUTING MECHANISM

163 Section 13 of the QPAP is titled "Limitations." This section sets forth certain rules for implementation of the QPAP and provisions that limit Qwest's obligations, or liabilities, under the QPAP. In this portion of the order, we address topics from section 13 of the QPAP such as when the QPAP should become effective, whether CLECs should be required to elect remedies, and when Qwest is excused from making payments, such as for force majeure events. In this portion of the order, we also discuss other QPAP sections that are intended to avoid unreasonable litigation and appeal, such as the method of payment, and recovery of payments from ratepayers.

1. Implementation of the QPAP/Effective Dates

164 The parties dispute several issues concerning when the QPAP should become effective, when Qwest should start to make payments and at what level, and when the QPAP should cease to be effective. The parties chose to rely on their pre-filed comments and did not address these issues during the hearing.

a. Effective Date of QPAP

165 Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. *Ex. 1217*. The Report recommends adopting this section of the QPAP. *Report at 74-75*. The Report also requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.³⁸ *Report at 75*. The parties dispute whether the QPAP should become effective before or after the FCC approves Qwest's application for section 271 relief for Washington state.

AT&T

166 Although AT&T advocated during the Multi-state Proceeding that the QPAP become effective immediately, AT&T now agrees with the Utah Staff proposal that the plan become effective in a state on the date Qwest files an application with the FCC for that state. *AT&T Comments at 40*. AT&T argues that Qwest should be prepared to comply with the QPAP at the same time that it asserts to the FCC that it is compliant with section 271 requirements.

³⁸ Qwest began filing such reports with the Commission in January 2002, reflecting payments that would have been made based on performance for November 2001. These reports will be admitted into the record as Exhibit 1223-C.

WorldCom

167 WorldCom argues that the QPAP should become effective as soon as the Commission approves the plan. WorldCom argues that doing so will allow the Commission to review evidence on the effectiveness of the plan prior to Qwest's entry into the long distance market. *WorldCom Comments at 24-25*. WorldCom argues that other states have adopted self-executing remedy plans to enforce section 251 requirements prior to section 271 approval. *Id.*

Covad

168 In comments filed in the Multi-state Proceeding, Covad argued that the QPAP should become effective immediately to prevent discriminatory conduct from occurring while the FCC considers Qwest's application. *Covad Comments at 11-12 (Covad Comments)*. Covad does not believe the QPAP is helpful in detecting discriminatory conduct. *Id.* Covad argues that the Commission has authority to implement the QPAP immediately based upon its authority to enforce service quality standards for wholesale services. *Covad Communications Company's Opening Brief on Qwest Corporation's Proposed Performance Assurance Plan at 4 (Covad Opening Brief)*. Covad further argues that Pennsylvania, Michigan, and Georgia have all ordered performance plans to be implemented immediately. *Id. at 7*.

Joint CLECs

169 The Joint CLECs argue that the QPAP should become effective immediately to encourage "nondiscriminatory service in the critical early stages of competition," citing the Georgia Public Service Commission's decision on BellSouth's performance plan. *ELI/Time Warner Telecom/XO's Opening Brief on Qwest's Performance Assurance Plan at 18-19 (Joint CLEC Opening Brief)*. The Joint CLECs also note that implementing the QPAP immediately would provide CLECs and the Commission with necessary information about how the QPAP will operate and its impact on CLECs. *Id. at 20*.

Qwest

170 Qwest asserts that the QPAP is voluntary and not a mandatory requirement of section 271. *Qwest Rebuttal at 36*. Qwest asserts that the Commission has no independent state authority to implement a QPAP. *Id. at 37*. Qwest also argues that its efforts to obtain section 271 relief are sufficient incentive to perform well. *Id. at 36*. Qwest has agreed to make monthly filings of performance data to the Commission as directed in the Report.

Discussion and Decision

171 Similar to the Facilitator's Report, the Colorado Hearing Examiner has proposed that the plan become effective upon FCC approval of an application, but that Qwest must begin to file immediately performance reports and a calculation of the payments it would make if the plan were effective. *November 5, 2001 Colorado Decision at 12*. The November decision explains the if the plan were to go into effect upon state approval, the six-month review would possibly occur at the time of Qwest's application to the FCC and the Commission's comments on the application, causing resource issues for the Commission. *Id. at 11-12*.

172 This Commission is currently reviewing Qwest's performance data, as well as projected payments due to any performance failures. Further, the FCC will receive all evidence of Qwest's pre-application performance. We agree with Qwest that providing such information is a sufficient incentive to perform well prior to filing its application and receiving section 271 authority. Thus, we adopt the Facilitator's recommendation that the plan should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington. The Colorado Hearing Examiner's reasoning is also compelling: The Commission may not have the resources to conduct a six-month review at the same time a recommendation is due to the FCC on Qwest's application.

b. Memory of Payments at Effective Date

173 Sections 14.1 and 14.2 of the QPAP provide that, upon the effective date, Qwest will file reports of its monthly performance with CLECs and the state Commission. Given that the QPAP provides that Qwest must file monthly reports tracking its performance, some CLECs argue that Qwest should begin making payments at an escalated level once the QPAP becomes effective. The Report rejected the CLECs' proposal that the QPAP should include a "memory" of past performance upon the effective date. *Report at 75*. The parties continue to dispute whether payment levels should begin at an escalated level when the QPAP becomes effective.

AT&T

174 AT&T argues that the slate should not be wiped clean upon the effective date of the QPAP, ignoring Qwest's past poor performance. *AT&T Comments at 41*. Similar to its arguments concerning the proper effective date, AT&T argues that this creates a disincentive to performing well prior to obtaining section 271 approval.

Covad

175 Covad argues that the payments, or "penalties," are an essential part of the QPAP. *Covad Opening Brief at 8*. Covad asserts that if Qwest's performance has been so

poor that escalated payments would have been in effect, that Qwest should begin making payments at the escalated, or historical, level. *Id.*

Qwest

176 Qwest argues against a memory of payments on the effective date for the same reasons it opposes an immediate effective date. *Qwest Rebuttal at 36; see also Reply Brief of Qwest Corporation in Support of its Performance Assurance Plan at 44.*

Discussion and Decision

177 We adopt the Facilitator's recommendation on this issue. Payment levels should start at the one month level when the QPAP becomes effective. The reasons the CLECs state to justify requiring payments to begin at escalated levels are (1) to create additional incentive for Qwest to perform better, (2) to create a more open local market, and (3) to compensate CLECs. As we have discussed above, Qwest's performance records and mock payment levels are currently available to the Commission, as well as to the FCC. We do not believe the threat of escalated payments at the effective date will significantly increase Qwest's incentive to comply with section 271 requirements. If Qwest wants section 271 authority from the FCC, it stands to reason that Qwest has sufficient incentive to perform well now.

c. Termination of QPAP if Qwest Exits Long Distance Market

178 Section 16.2 of the QPAP provides that the plan will be rescinded immediately if Qwest exits the interLATA market. *Ex. 1217*. The Report recommends adopting this section of the QPAP, and allowing Qwest to terminate the QPAP when it exits the long distance market. *Report at 75*. The parties remain in dispute about whether the QPAP should remain effective if Qwest exits the long distance market.

Joint CLECs

179 The Joint CLECs object to the Facilitator's recommendation, arguing that the QPAP provides the only wholesale service quality rules and remedies in Washington. *Joint CLEC Comments at 42*. The Joint CLECs note that the Commission has not adopted such rules, choosing to look first to this proceeding for wholesale service quality issues. The Joint CLECs are concerned that, in the absence of rules adopted by the Commission, CLECs will have no remedy for anti-competitive behavior by Qwest if Qwest leaves the long distance market and focuses its efforts solely on the local market. *Id.*

Discussion and Decision

180 We share the Joint CLECs' concerns that CLECs may be without remedy if the QPAP were to automatically terminate if Qwest leaves the long distance market. The proposed Colorado plan provides that the plan will expire in six years, except that payments to individual CLECs will continue subject to a review of their necessity. *CPAP, Section 18.11*. We find the Colorado Hearing Examiner's determination appropriate and require Qwest to modify the QPAP to mirror the CPAP provision on this issue. This will allow Qwest to eliminate certain payments upon leaving the market, but allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules.

2. Election of Remedies

181 Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The QPAP requires CLECs to waive their rights to seek alternative remedies for poor performance. The version of the QPAP that Qwest filed in the Multi-state Proceeding included an exception allowing CLECs to seek remedies for non-contractual causes of action. *See Ex. 1200*. The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments. *Report at 32*.

182 The Facilitator recommended modifying section 13.6 of the QPAP by adding the following:

By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a non-contractual claim, theory, or cause of action).

Ex. 1217.

AT&T

183 AT&T first objects to the Facilitator's statements that the QPAP is a liquidated damages plan that is intended to replace costly litigation. *AT&T Comments at 11, citing Report at 28*. AT&T stresses the difference between the QPAP and a bilateral contract between commercial parties. *Id. at 11-12*. While AT&T agrees that QPAP payments will, in some circumstances, remedy the harm caused by Qwest's poor

performance, AT&T asserts that QPAP remedies should not be the exclusive remedy. *Id. at 14.*

184 During the Multi-state Proceeding, AT&T objected to Qwest's original QPAP sections 13.5 and 13.6 as limiting a CLEC's alternative remedies. *Id. at 21-22; see also Ex. 1225 at 7-8; Ex. 1227 at 19.* AT&T strenuously objects to the Facilitator's modifications to QPAP section 13.6. *AT&T Comments at 17.* AT&T asserts that the Facilitator's modifications would preclude a CLEC from bringing any contractual cause of action, or damages from any non-contractual cause of action, something that Qwest itself had never intended. *Id. at 17-18.* In particular, AT&T argues that the Facilitator's language would preclude a CLEC from receiving any remedy in an anti-trust matter except for the "adder." *Id. at 18.*

185 AT&T requests that the Commission adopt section 16.6 of the CPAP. That section would require an election of remedies, but allows CLECs to seek additional remedies for substantial harm not contemplated by the QPAP by seeking permission through the dispute resolution process to proceed with the action. Section 16.6 of the CPAP provides, in part:

Tier 1X payments are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 17 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

186 AT&T argues that an exclusive election of remedies provision is inequitable, and that CLECs should be able to sue for additional contract damages to protect themselves against extraordinary losses that may result from Qwest's poor performance. *AT&T Comments at 17-18.*

187 Alternatively, AT&T and WorldCom propose to substitute the Facilitator's proposal in section 13.6 of the QPAP with the following: "A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP." *WorldCom and AT&T Comments on Qwest's Responses to the Bench Requests at 2 (World Com and AT&T Joint Comments).*

WorldCom

188 During the Multi-state Proceeding, WorldCom objected to language in QPAP sections 13.5 and 13.6 that precludes payment of double recovery for “analogous” acts. *WorldCom Opening Brief of WorldCom, Inc. Regarding Qwest Corporation’s Proposed Performance Assurance Plan at 18; see also Ex. 1241 at 53.* WorldCom notes that it does not object to precluding double recovery, but believes “analogous” is too vague a term. *Id.*

189 As noted above, WorldCom and AT&T proposed alternative language to include in QPAP section 13.6. *WorldCom and AT&T Joint Comments at 2.*

Covad

190 Covad objects to any provision in the QPAP, in particular sections 13.5 and 13.6, that may preclude “CLECs from exercising their rights to pursue any legal or regulatory action, with attendant remedies.” *Covad Opening Brief at 43.* In particular, Covad objects to provisions that would limit “CLEC rights to pursue Section 251/252 remedies that supplement the PAP, state law regulatory enforcement actions, federal enforcement action under Section 271(d)(6), or any applicable antitrust, tort, contract, or state consumer protection remedies.” *Id. at 42.*

Joint CLECs

191 The Joint CLECs oppose the Facilitator’s proposed modification to QPAP section 13.6 that limits a CLEC’s alternative remedies. *Joint CLEC Comments at 37-39.* Further, the Joint CLECs oppose that portion of the Facilitator’s Report justifying the modification. *Id. at 37.* Specifically, the Joint CLECs argue that making the QPAP payments the exclusive remedy would deny CLECs the rights to pursue alternative remedies for harm caused by certain performance not measured by, or provided for under the QPAP, e.g., EELS and canceled orders. *Id. at 38.* The Joint CLECs recommend that the Commission modify the QPAP to allow CLECs to adopt the QPAP as a whole, without waiving their rights to seek alternative remedies for harm caused by Qwest’s violation of contractual or statutory requirements. *Id. at 39.*

Qwest

192 Qwest asserts that the Facilitator’s proposed language allows CLECs to pursue non-contractual remedies, but, in conjunction with the offset provision, also in section 13.6, precludes a CLEC from obtaining a double recovery. *Qwest Rebuttal at 12.* Qwest agrees with the Facilitator that allowing CLECs to pursue alternative remedies is “substantially unbalanced.” *Id. at 13, quoting Report at 11.*

Discussion and Decision

193 After reviewing the parties' arguments, pleadings, and the proposed QPAP and CPAP, we agree with the CLECs that the modifications proposed in the Report to QPAP section 13.6 are not acceptable. The Report finds that portions of sections 13.5 and 13.6 may be contradictory and then eliminates any alternative remedies for CLECs. *Report at 32.* QPAP section 13.5 and CPAP section 16.4 are similar in that they allow CLECs to pursue other non-contractual legal and non-contractual regulatory claims and remedies, in addition to obtaining payments under the QPAP. However, in contrast to CPAP section 16.6, QPAP section 13.6, as modified by the Facilitator, severely, and inequitably, limits the alternative remedies available to CLECs. As discussed by the Joint CLECs, there are certain matters not yet covered by QPAP payments which could lead to severe inequities if QPAP payments were the sole remedy available.

194 AT&T and WorldCom's proposed election of remedies language is clear and straightforward. We also find the language in section 16.6 of the proposed CPAP to be clear and explicit about the types of alternative remedies available to CLECs, and believe it may avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.

195 Therefore, Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include a portion of section 16.6 of the CPAP as shown below.

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest. A CLEC may elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.

13.6.1 Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in section 5.18 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming

performance in the relevant area do not address the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with the action.

3. Offsetting Remedies

196 As originally filed in the Multi-state Proceeding, QPAP section 13.7 allowed Qwest itself to offset any award “for the same or analogous wholesale performance covered by this PAP.” *Ex. 1200, Att. 1*. The Facilitator modified section 13.7 to clarify when an offset should be made, and to preclude an offset for payments relating to CLEC or third-party damage to property or personal injury. *Report at 36*. However, the Facilitator did not modify language allowing Qwest the right to make the offset. *Id. at 35*.

AT&T

197 AT&T argues that section 13.7 as originally drafted, and modified by the Facilitator, gives Qwest unilateral control over offsets. *AT&T Comments at 20*. AT&T does not object to the concept of offsets. *Tr. 6102-3*. AT&T is concerned that allowing Qwest the right to offset, subject to the dispute resolution process in the SGAT, would create an additional layer of litigation. *Id. at 21*. As such, AT&T argues that the provision is contrary to the FCC’s criteria for reviewing a performance assurance plan. *Id.* AT&T argues that the Texas plan and proposed CPAP both give the power to offset an award to the finder of fact, whether it be a state regulatory commission or a court. *Id.; see also Tr. 6121*. AT&T requests that the Commission adopt the language in the Texas plan, CPAP or Utah Staff Report relating to offsets. *AT&T Comments at 21-22*.

WorldCom

198 WorldCom asserts that Qwest improperly inserted a sentence into QPAP section 13.7 concerning offsets of portions of damages allowed by non-contractual theories of liability that are not also recoverable under contractual theories of liability. *WorldCom and AT&T Joint Comments at 2*. WorldCom requests the Commission order Qwest to remove the sentence, as the Facilitator did not recommend its addition. *Id.*

Covad

199 Like AT&T, Covad objects to any unilateral right of Qwest to offset an award granted to a CLEC. *Covad Opening Brief at 42*. Covad is concerned that a Qwest right to offset would effectively deny a CLEC the right to pursue alternative legal remedies. *Id. at 43*.

Joint CLECs

200 The Joint CLECs object to the Report and QPAP section 13.7 for two reasons: first, the Joint CLECs reject the notion that offsets should be allowed, and second, that Qwest has any right to unilaterally offset an award, as opposed to reserving that right to the entity determining the award. *Joint CLEC Comments at 33-34*. The Joint CLECs note that the Utah Staff rejected the concept of offsets, noting that Utah rules do not allow for offsets. *Id. at 34*. The Joint CLECs request that the Commission order Qwest to remove section 13.7 from the QPAP, or in the alternative, modify the section to preclude Qwest from unilaterally making the offset. *Id. at 36*.

Qwest

201 Qwest asserts that the issue is whether Qwest has more than the right to argue for an offset. *Qwest Rebuttal at 15*. Qwest asserts that it needs to clearly state its rights in the QPAP. *Id.* In the Multi-state Proceeding, Qwest argued that any payment offset disputes could be handled through the dispute resolution process or arbitrated. *Brief of Qwest Corporation in Support of its Performance Assurance Plan at 70, n.230*. Qwest also expressed the concern that a court may not interpret the QPAP in the same manner as a regulatory commission, and that it, therefore, wishes to retain control over offsets. *Id. at 69*.

Discussion and Decision

202 Allowing Qwest to make the sole decision about what to offset is inappropriate. The QPAP is intended to provide self-executing payments for poor performance and to avoid needless and protracted litigation. Giving Qwest the right to determine whether to offset and the amount of offset may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. We find that the language in section 16.7 of the proposed CPAP appropriately addresses the issue. Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the proposed CPAP and delete the last sentence of section 13.7 as requested by WorldCom.

4. Force Majeure Language

203 Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments. As described in the Report, the CLECs raised a number of issues with Qwest's proposed language concerning force majeure events. *Report at 36-38*. The Report recommended referencing SGAT section 5.7 which defined force majeure events, allowing state commissions to resolve disputes over force majeure events, and adding language proposed by AT&T to further define the connection between the force majeure event and Qwest's performance,

determining that such events applied to benchmark, but not parity measurements. *Id.* at 39-40.

204 Qwest modified its QPAP to incorporate the Report's recommendations, but failed to delete language referring to parity measurements. *Ex. 1217; Qwest Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 2 (Qwest Response re: Bench Request No. 37).*

AT&T/WorldCom

205 AT&T and WorldCom filed comments noting that Qwest included AT&T's force majeure language as required by the Facilitator, but inappropriately included a reference to parity measures in the last sentence of section 13.3. *AT&T and WorldCom Joint Comments at 2-3.*

Public Counsel

206 Public Counsel agrees with the Report's recommendation that Qwest provide notice of a force majeure event within 72 hours of learning of the event. *Public Counsel Comments at 14.* However, Public Counsel requests that the Commission require Qwest to modify section 13.3 to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission "no later than the last business day of the month after the month in which payments are being disputed." *Id.*

Qwest

207 Qwest does not respond to Public Counsel's request to modify section 13.3. Qwest initially agreed with AT&T and WorldCom that the reference to parity measures at the end of section 13.3 in the red-lined QPAP should be deleted. *Qwest Response re: Bench Request No. 37 at 2.* Qwest later asserted that the reference to the term "parity" in the last sentence of section 13.3 in Exhibit 1217 is correct and should not be stricken. *Supplement to Qwest's Response to AT&T and WorldCom's Comments on Qwest's Response to Bench Request No. 37 at 1-2.* Qwest asserts that the sentence at issue applies not just to force majeure events, but also to other excusing events, and that the reference is appropriate and should remain in the QPAP. *Id.*

Discussion and Decision

208 We find Public Counsel's request to be reasonable. The Facilitator notes that Qwest agreed during the Multi-state Proceeding that state commissions were the appropriate entity to resolve disputes over requests for waivers. *Report at 39.* Qwest must modify section 13.3 to reflect Public Counsel's requests.

209 As to the reference to parity in section 13.3 of the QPAP, we note, as did Qwest, that AT&T's proposed language for the force majeure section does include a reference to parity. *See Ex. 1225 at 12*. However, we also find the Facilitator's arguments persuasive that "parity . . . requires that parity measures may not be subject to force majeure payment exclusions." *Report at 40*. Qwest must strike the reference to "parity" in the last sentence of section 13.3 of the QPAP.

. Does QPAP or SGAT Language Prevail

210 Qwest intends to incorporate the QPAP into the SGAT as Exhibit K to the SGAT. *Qwest Initial Comments at 4*. Several parties raised concern that incorporating the QPAP into the SGAT creates a question as to which document prevails over the other.

AT&T

211 AT&T points out several inconsistencies between the QPAP and the SGAT, notably where the SGAT requires Qwest to pay penalties or compensate the CLEC for failure to take some act, and the QPAP, which limits CLEC remedies and requires that CLECs elect remedies. *AT&T Comments at 43-44; Tr. 6140-41*.

Qwest

212 Qwest asserts that to the extent the SGAT and the QPAP both provide for a payment to a CLEC for failure to perform, the CLEC must elect remedies between the SGAT and QPAP. *Tr. 6144*. Qwest also asserts that there should not be conflicts between the SGAT and QPAP. *Tr. 6146*.

Discussion and Decision

213 The SGAT sets forth Qwest's and the CLEC's obligations to each other when interconnecting their networks to provide intraLATA service. The QPAP is a set of performance measurements and agreed-to payments for Qwest's failure to meet those measurements. Understandably, the CLECs who have negotiated certain language in the SGAT argue that the SGAT should prevail, or at least that inconsistencies should be addressed before the QPAP goes into effect. As the QPAP is being incorporated into the SGAT, it ought to conform to the SGAT, not trump the SGAT. The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT.

214 In response to the Commission's question as to whether the QPAP is consistent with existing provisions in the Washington SGAT and interconnection agreements, AT&T, WorldCom, and other parties noted several inconsistencies, but had not completed their review. During the oral argument, the administrative law judge acknowledged

that the Commission would establish a process to determine compliance between the QPAP and the Facilitator's Report. *Tr. 6243*. Given that the parties do not yet know if there is conflict between the SGAT and the QPAP, we believe it will be necessary to also determine consistency with the SGAT at the same time.

6. Payment Method

215 Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check. The Report found Qwest's proposal appropriate, stating that CLEC arguments about the administrative convenience of requiring the equivalent of cash were not persuasive. *Report at 76*.

WorldCom

216 WorldCom opposes the Facilitator's decision, referring to the Colorado Hearing Examiner's decision which found that bill credits are more difficult to administer than cash equivalent payments and noted several circumstances where Qwest would be required to make cash payments anyway, despite the use of the bill credit method. *WorldCom Comments at 26-27*. WorldCom asks the Commission to require payments to CLECs under the QPAP in the form of cash rather than bill credit. *Id.*

Covad

217 Covad asserts that using bill credits will create serious administrative difficulties for CLECs and will likely delay the CLECs' ability to use the payment because the payment will become entangled with other billing issues. *Covad Opening Brief at 26*.

Public Counsel

218 Public Counsel asserts that the use of bill credits may result in additional disputes related to billing issues which would be counterproductive for all parties and contrary to the goal of having a PAP that is self-executing. *Public Counsel Comments at 17*. Public Counsel recommends the Commission adopt the Colorado approach of providing for cash payments to CLECs, but allowing Qwest to credit the payments for bills that are more than 90 days past due. *Id.*

Qwest

219 Qwest states that bill credits are not complex to administer and the form in which the credits are issued is not at all confusing. *Qwest Rebuttal at 37-38*. Qwest is also concerned with its growing accounts-receivable from CLECs and believes cash payments would be tantamount to providing CLECs unjustified cash subsidies. *Id.*

Discussion and Decision

220 We are persuaded that the Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance between the competing positions of the parties. That is, Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due. Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: "All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due."

7. Recovery of Payment From Ratepayers

221 During the Multi-state Proceeding, AT&T requested that the QPAP include specific language prohibiting Qwest from recovering in rates from its regulated ratepayers the payments made under the QPAP. *AT&T's Brief Regarding Qwest's Proposed Performance Assurance Plan at 29*. The Facilitator recommended against including such a provision, agreeing with Qwest that such a provision is unnecessary, given that state and federal case law already precludes a BOC from recovering plan payments in rates. *Report at 86*.

AT&T

222 In comments filed with the Commission, AT&T disagreed with the Facilitator that the FCC and state commissions did not need guidance in the QPAP on this issue. *AT&T Comments at 42*. AT&T urges the Commission to include specific language precluding Qwest from recovering QPAP payments in its revenue requirement, or from wholesale customers. *Id.*

Public Counsel

223 Public Counsel requests the Commission include a provision stating that Qwest may not recover QPAP payments in rates from its retail or wholesale customers. *Public Counsel Comments at 15-16*.

Qwest

224 Qwest argues that the QPAP's function is not a state ratemaking document. Further, Qwest argues that a provision concerning recovery in rates is not necessary as the FCC has prohibited BOCs to seek such recovery in rates. *Qwest Rebuttal at 40*.

Discussion and Decision

225 We adopt the Report's recommendation that there is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates. To the extent there is state and federal case law addressing the issue, we believe that is sufficient to govern Qwest's behavior and provide this Commission with guidance in the event a question should arise about Qwest's actions.

8. Recalculation of Payments

226 Upon the CLECs' request, the Report recommends that Qwest retain records of the underlying performance and payment data for a three-year period. *Report at 83.* The Report also recommends a QPAP provision that would allow payments to be recalculated retroactively for a three-year period. *Id.* As recommended in the Report, Qwest modified its QPAP to include section 14.4, which allows Qwest to recalculate payments made under the QPAP for up to three preceding years. *Ex. 1217.*

227 In Bench Request No. 40, the Commission asked Qwest whether other state plans contained a similar section and why Qwest believes the section should be included in the QPAP. Qwest responded that this section is unique to the QPAP, and that the Facilitator directed Qwest to add the language. *Ex. 1287.*

228 The FCC requires that performance plans have a self-executing mechanism that does not open the door unreasonably to litigation and appeal.³⁹ We are concerned that the language in this section is too vague. The section does not state whether the recalculation would take place as a result of any exclusion permitted under section 13.3, or for some other reason, such as Qwest discovering it has somehow been calculating payments incorrectly over a several-year period, or as a result of an audit under section 15 of the QPAP.

229 We concur with the Facilitator that the QPAP should include a retention period. However, the vagueness of the section detracts from the certainty that this plan is supposed to provide to the parties. If Qwest or any party believes there is a problem with a calculation, such concerns should be raised and dealt with by the Commission contemporaneously. Qwest must strike the first three sentences in section 14.4, and replace them with the following: "Qwest shall retain for a three-year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP."

³⁹ *Bell Atlantic New York*, ¶433.

G. ASSURANCES OF REPORTED DATA'S ACCURACY

1. Multi-state Audits/Investigations

- 230 The audit program in the QPAP is intended to provide “sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive QPAP payments and will serve as a primary basis for [commission] oversight of wholesale performance.” *Report at 78-79*. The Facilitator found that the audit program in Qwest’s original QPAP was not sufficient, as it (1) made it difficult to track significant changes in the systems, methods, and activities by which Qwest measures performance, (2) did not provide assurances for tracking data accuracy into the future, and (3) allowed Qwest too much control over the program of auditing its own system of performance measurement. *Id. at 79*.
- 231 The Report recommended a multi-state process for audits, noting that there would be substantial commonality among issues, and that Qwest would face significant costs if all 14 states in its region were to conduct individual audits. *Id. at 79*. The Report also recognized that states will need to retain the ability to conduct their own audits to meet the particular needs and circumstances of the state. *Id.*
- 232 The Report proposes an audit approach that allows for both pre-planned and as-needed testing of Qwest’s measurement program. *Id. at 80*. The Report expresses concern that the audit program focus on particular performance measurements that appear to be unstable or of particular risk. *Id.* Finally, the Report recommends that the states jointly retain an independent auditor for a two-year period to conduct the audit, and assess the need for individual audits requested by individual CLECs. *Id. at 81*. The Report recommends use of Tier 2 funds to support audit costs, as well as a portion of Tier 1 escalated payments should the Tier 2 funds prove insufficient. *Id. at 82*.
- 233 Qwest has modified the QPAP consistent with the Facilitator’s recommendations. The red-lined QPAP provides for a two-year audit cycle and a “detailed audit plan developed by an independent auditor retained for a two-year period.” *Ex. 1217, §15.1*. The QPAP identifies the scope of the audit plan as “identifying specific performance measurements to be audited, the specific tests to be conducted, and entity to conduct them,” with specific attention to “higher risk areas identified in the OSS report.” *Id., §15.1.2*.
- 234 The QPAP proposes that a committee of Commissioners from different states would have oversight over the auditor’s activities, and would resolve disputes arising from the audit. *Id., §§15.1.1, 15.1.4*. The QPAP requires Qwest to report any changes it makes to management processes to ensure the propriety of the changes. *Id., §15.2*. Any disagreements between Qwest and CLECs about accuracy or integrity of data will be referred to the auditor. *Id., §15.3*. CLECs may not request an audit after three

years have elapsed from the payment date. *Id.* The audit program expenses are to be paid first from Tier 2 payments to the “Special Fund,” and then one-half from Tier 1 funds in the Special Fund, and one-half by Qwest. *Id.*, §15.4.

- 235 Qwest made no changes to section 15.5 of the QPAP which addresses investigations by Qwest into whether CLECs were responsible for Tier 2 misses.

CLECs

- 236 The participating CLECs did not comment on the multi-state audit and investigation process contemplated in the Report and red-lined QPAP, other than to object strongly to the proposed use of Tier 1 funds for multi-state efforts. Their comments are discussed in more detail below concerning the Special Fund.

Public Counsel

- 237 Public Counsel objects to the Facilitator’s recommendation for a multi-state audit, investigation and review process. Public Counsel argues that performance issues may differ in each state, because CLECs use different modes of entry in each state, each state experiences different levels of competition, and that wholesale service quality will also likely differ in each state. *Public Counsel Comments at 10*. Public Counsel also objects to the “delegation of state regulatory authority to an unofficial, informal body.” *Id. at 11*. Public Counsel recommends that the Commission retain sole authority over reviews, audits, and monitoring of Qwest’s performance in Washington under the QPAP. *Id.*

Qwest

- 238 Qwest argues that the Commission recognized in its 12th *Supplemental Order* the commonality of issues and the efficiencies that would be gained through a multi-state review process. *Qwest Rebuttal at 38-39*. Qwest responds to Public Counsel’s concerns of delegation of state authority by referring to statutory authority in RCW 80.01.070 for the Commission to participate in joint hearings outside of the state of Washington. *Id. at 39*. Qwest recommends the Commission adopt the recommendations in the Report for multi-state audit and investigation processes. *Id.*

Discussion and Decision

- 239 We concur in the Report’s findings that Qwest’s original proposed audit program in section 15 of the QPAP is not sufficient to ensure a high level of confidence in the performance results that Qwest measures. However, as we have discussed above concerning the six-month review process and the creation of a Special Fund, we are

not prepared to commit ourselves, at this time, to the specific multi-state review process set forth in Qwest's red-lined QPAP.

240 Consistent with our discussion above concerning Commission jurisdiction for continued oversight over the QPAP, we believe it is the state's responsibility to evaluate any issues that may arise over performance results or performance measures, including changes in the way Qwest produces performance results. However, should we determine that it is appropriate to join the efforts of other states in a multi-state auditing or investigation process, we do not believe it is a delegation of state authority to do so, given our statutory authority to engage in joint hearings outside of the state. *See RCW 80.01.070.*

241 We prefer to wait and see how the ROC-TAG process develops before agreeing to a specific multi-state review process for an audit process. Therefore, we defer our decision on participation in any multi-state audit process until a later date. To that end, Qwest must replace the language in sections 15.1 through 15.4 of the red-lined QPAP, Exhibit 1217, with the following:

- 15.1 Any party may request that the Commission conduct an audit of performance results or performance measures. The Commission will determine, based upon requests and upon its own investigation, which results and/or measures should be audited. The Commission may, at its discretion, conduct audits through participation in a collaborative process with other states.
- 15.2 The costs of auditing will be paid for from Tier 2 funds. If such funds are insufficient, the Commission may require that a portion of Tier 1 escalated payments be set aside for auditing programs.
- 15.3 Qwest must report to the Commission monthly any changes it makes to the automated or manual processes used to produce performance results including data collection, generation, and reporting. The reports must include sufficient detail to enable the parties to understand the scope and nature of the changes.
- 15.4 In the event of a dispute between Qwest and any CLEC regarding the accuracy or integrity of data collected, generated, and reported pursuant to the QPAP, Qwest and the CLEC will first consult with one another and attempt to resolve the dispute. If the issue is not resolved within 45 days, either party may request that the Commission consider the matter.

242 Further, we are concerned that section 15.5 of the QPAP is not clear as to who would conduct the investigation and more importantly, who would make the determination

regarding CLEC responsibility. We are also concerned that this section addresses only investigation into Tier 2 misses, but not Tier 1 misses. Based on these concerns, Qwest must modify section 15.5 as follows:

- 15.5. *Any party may petition the Commission to request that Qwest investigate any consecutive Tier 1 miss or any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. Qwest will report the results of its investigation to the Commission, and to the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest may petition the Commission to request that it receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. Qwest may also request that the relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated as Tier 2 will be aggregated and the aggregate results will be investigated pursuant to the terms of this agreement.*

2. Monthly Reports to Public Counsel

243 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP. Public Counsel requests that the Commission modify the QPAP to allow Public Counsel to receive monthly QPAP performance reports provided to the Commission. *Public Counsel Comments at 13; see also Tr. 6229-6230.* Qwest did not respond to Public Counsel's request.

244 We find it appropriate that Public Counsel should receive copies of the monthly reports filed with the Commission. We note that the CPAP requires that Qwest provide such reports to the Colorado Office of Consumer Counsel. *CPAP, Section 13.2.* Qwest must modify section 14.2 of the QPAP as follows: "Qwest will also provide to the Commission, and relevant parties upon request, a monthly report of aggregate CLEC performance results . . ."

VII. FINDINGS OF FACT

245 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed discussion that state

findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

- 246 (1) Qwest Corporation, formerly U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. § 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.
- 247 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under section 252(f)(2) of the Act.
- 248 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.
- 249 (4) Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the state commission of any state that is the subject of a BOC's application under section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).
- 250 (5) The FCC has relied on performance assurance plans developed collaboratively by the BOC, CLECs, and the states in determining whether the BOC has met in part, the public interest requirement of section 271(d)(3)(C).
- 251 (6) Pursuant to 47 U.S.C. § 252(f)(2), BOCs must submit any statement of terms and conditions that the company offers within the state to the state commission for review and approval.
- 252 (7) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of section 271(c) in Docket No. UT-003022.
- 253 (8) On July 23, 2001, the Commission issued the *12th Supplemental Order* in this proceeding, directing the parties to participate in the Multi-state Proceeding for the initial review of Qwest's Performance Assurance Plan, or QPAP.
- 254 (9) During hearings held on August 14-17 and August 27-29, 2002, in the Multi-state Proceeding in Denver, Colorado, Qwest, a number of CLECs, and Public Counsel submitted testimony, exhibits, and briefs to allow the Facilitator to evaluate the sufficiency of Qwest's Performance Assurance Plan.

- 255 (10) On October 22, 2001, the Facilitator for the Multi-state Proceeding issued his Report on Qwest's Performance Assurance Plan. Consistent with our decision in the 12th *Supplemental Order*, the Facilitator's Report is an initial order of the Commission.
- 256 (11) In preparation for hearings held before the Commission on December 18 and 19, 2001, in Olympia, Washington, Qwest, a number of CLECs, and Public Counsel submitted written comments on the Facilitator's Report, as well as responses to bench requests and questions, to allow the Commission to evaluate the sufficiency of Qwest's Performance Assurance Plan as modified by the Report.
- 257 (12) The QPAP is intended to be a self-executing remedy plan to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant an application by Qwest to provide in-region, interLATA service in Washington state.
- 258 (13) Qwest intends to incorporate the QPAP into the SGAT as Exhibit K, and to require CLECs with approved interconnection agreements to adopt the QPAP as a part of their agreement.
- 259 (14) Under the QPAP, Qwest must make payments to individual CLECs (Tier 1 payments) or the state (Tier 2 payments) if Qwest fails to meet certain performance standards. The standards are based on performance measurements that were defined by Performance Indicator Definitions (PIDs) developed in the ROC OSS collaborative.
- 260 (15) The Colorado Commission has not approved a final performance assurance plan. A hearing examiner has issued recommendations and proposed a draft plan, the CPAP, for consideration by the full Commission. The parties have asked a Special Master to consider several issues before the full Commission considers the plan as a whole.
- 261 (16) The Staff of the Utah Department of Public Utilities modified the recommendations in the Facilitator's Report and issued its own recommendations to the Utah Commission.
- 262 (17) The record in this proceeding is replete with references to other state performance assurance plans, finalized or in progress.
- 263 (18) Section 12 of the QPAP establishes a revenue cap on total payments of 36 percent of Qwest's 1999 ARMIS Net Revenue, and allows the cap to increase by as much as 8 percent, or decrease by as much as 6 percent, depending upon Qwest's performance.

- 264 (19) The CLECs and Public Counsel do not object to using current ARMIS revenue data, even if that data would result in a total amount at risk that is lower than in prior years.
- 265 (20) Table 2 of Qwest's QPAP incorporates the Facilitator's recommendation that, if Qwest fails to meet a performance standard for an individual CLEC for consecutive months, the payment amount for the measure escalates each month up to six months, and is then capped.
- 266 (21) Sections 8 and 9 of the proposed QPAP contain provisions that limit the potential payments to CLECs for substandard performance to the total number of orders placed by the CLEC during the month for each qualifying product and sub-measure.
- 267 (22) Qwest modified section 7.3 to include the Facilitator's recommendation that Qwest should make Tier 2 payments in the event Qwest fails to meet the performance standard for any Tier 2 performance measure for two consecutive months in any consecutive three month period, during any 12 month rolling period.
- 268 (23) The Facilitator recommended that payments for Tier 2 measures with no Tier 1 counterpart should escalate as provided for in the QPAP.
- 269 (24) Qwest modified section 6 of the QPAP to show proposed payments relating to the provision of collocation.
- 270 (25) In addition to collocation requirements in the QPAP, the SGAT and WAC 480-120-560 establish standards and payments for collocation provisioning in Washington State.
- 271 (26) Section 5.1 of the QPAP contains the critical Z values that are used for statistical testing.
- 272 (27) Section 12 of the QPAP establishes caps on monthly and annual payments to CLECs and the state.
- 273 (28) Qwest's proposed QPAP does not include a carry-forward provision. Qwest has included in section 12.3 of the QPAP the Facilitator's proposal for equalizing monthly payments to CLECs when the annual cap is reached.
- 274 (29) Section 13.8 of the QPAP provides that Qwest is not required to make Tier 2 payments and any other payments, penalties or sanctions for "the same underlying activity or omission" under a Commission order or service quality

rules. Similarly, section 12.1 of the QPAP provides that the annual cap on payments includes all payments made by Qwest for “the same underlying activity or omission . . . under any other contract, order or rule.”

- 275 (30) Section 11.2 of the CPAP provides that “any penalties imposed by the Commission” are not subject to the cap, and section 16.8 of that plan provides a process for Qwest to dispute any payments under state service quality rules that it perceives are duplicate payments under the QPAP.
- 276 (31) The Report rejected the addition of new performance measurements for special access, canceled orders, cooperative testing, address due-date changes, pre-order inquiry time-outs, software release quality, test bed measurement, and missing status notifiers, found that Qwest had already added certain change management measures to the QPAP, and found that diagnostic measures for certain UNEs, i.e., EELs, line sharing, and sub-loops, should be added to the QPAP as soon as practicable.
- 277 (32) Performance standards have not been developed for EELs, sub-loops, and line sharing because commercial experience with them has been too limited to support a benchmark or parity standard. These UNEs are currently designated as “diagnostic UNEs” or TBD (to be decided).
- 278 (33) The Facilitator rejected a request by AT&T to assign higher payment amounts to high-value services.
- 279 (34) Section 16 of the QPAP provides a process for amending the performance measurements in the plan at six-month intervals. The Facilitator recommended three changes to the proposed process, including the SGAT dispute resolution process, a multi-state review process, including funding through a special fund consisting of contributions of Tier 1 and Tier 2 payments, and biennial reviews of the continuing effectiveness of the QPAP.
- 280 (35) Bench Request No. 39 asked Qwest to provide for the basis of underlying language in section 16.1 of the QPAP that limits the reclassification of the payment level for measures during a six-month review to whether the actual volume of data points was lesser or greater than anticipated.
- 281 (36) Section 7.5 of the QPAP provides that Tier 2 payments to the state will be placed in a state fund determined by the Commission or in the state General Fund if the Commission is not authorized to receive such payments, and states the purpose for using the funds.
- 282 (37) Qwest added section 11.3 to the QPAP to include the Facilitator’s recommendation to create a Special Fund comprised of one-third of Tier 2

payments and one-fifth of the escalated portion of Tier 1 payments to support the cost of multi-state six-month reviews, biennial reviews, audits, and QPAP administration.

- 283 (38) Section 13.1 of the QPAP provides that the plan becomes effective only when Qwest receives section 271 authority from the FCC for that state. The Report recommends adopting this section of the QPAP, and requires Qwest to file monthly reports of performance and presumed payment levels between October 2001 and the date the FCC grants section 271 relief.
- 284 (39) Section 16.2 of the QPAP provides that the plan is rescinded immediately if Qwest exits the interLATA market.
- 285 (40) Section 13.6 of the QPAP requires CLECs to elect a remedy for poor performance. If CLECs choose to receive payments under the QPAP, the QPAP provides that those payments are in the form of liquidated damages, and that the remedies are exclusive. The Report requires Qwest to modify portions of section 13.6 to further limit the exceptions, and to limit recovery under non-contractual remedies to any additional amount not recovered through QPAP payments.
- 286 (41) As modified by the Facilitator, QPAP section 13.7 allows Qwest itself to offset any award for similar acts or omissions, and precludes an offset for payments relating to CLEC or third-party damage to property, or personal injury.
- 287 (42) Section 13.3 of the QPAP provides a set of circumstances that would excuse Qwest from making Tier 1 and Tier 2 payments..
- 288 (43) Section 11.2 of the QPAP provides for payments to CLECs to be made by bill credit rather than cash or check.
- 289 (44) Qwest modified its QPAP, as recommended in the Report, to include section 14.4 which allows Qwest to recalculate payments made under the QPAP for up to three preceding years.
- 290 (45) The Report modified the audit process in section 15 of the QPAP, recommending a multi-state process for audits, and proposing an audit approach that would allow for both pre-planned and as-needed testing of Qwest's measurement program. Qwest incorporated the Facilitator's recommendations in section 15.
- 291 (46) Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of Qwest's performance for the measurements set forth in the QPAP.

VIII. CONCLUSIONS OF LAW

- 292 Having discussed above in detail all matters material to this decision, and having
stated general findings and conclusions, the Commission now makes the following
summary conclusions of law. Those portions of the preceding detailed discussion
that state conclusions pertaining to the ultimate decisions of the Commission are
incorporated by this reference.
- 293 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of this proceeding and the parties to the proceeding.
- 294 (2) The administrative process in the Multi-state Proceeding was not deficient, in
error, or compromised in any way. The Facilitator established a process that
provided an opportunity for the parties to be heard, for evidence to be gathered,
and for issues to be joined.
- 295 (3) The FCC's "zone of reasonableness" test is the most appropriate basis for
determining whether Qwest's proposed plan is sufficient to deter and enforce
backsliding behavior. The Facilitator correctly stated in the Report the five
prongs of the FCC's zone of reasonableness test, but went too far in stating his
own "considerations" for review of Qwest's QPAP and his comments on
increasing Qwest's incentives.
- 296 (4) We reject the Facilitator's statements on pages 5 and 6 of the Report,
beginning with the sentence: "The ultimate decision on the QPAP's
sufficiency, as the FCC addresses the matter, should be one that takes into
account the following considerations:"
- 297 (5) The Commission has authority under state law and the Telecommunications
Act to require Qwest to act if it fails to perform such that it provides service
that is unfair, unreasonable or would stifle competition in the state.
- 298 (6) While procedural fairness requires that the Commission begin with Qwest's
proposed QPAP, it is appropriate for this Commission to consider the
provisions of other state plans to determine whether elements of Qwest's
performance assurance plan are sufficient to deter and enforce backsliding
behavior in Washington state.
- 299 (7) Given the FCC's actions in approving performance assurance plans, and
Qwest's current performance, there is no basis to modify the Facilitator's
recommendations that Qwest's payments to CLECs and the state under the
QPAP should be capped, or that 36 percent of Qwest's ARMIS Net Revenue

should be put at risk for payment to CLECs for failure to meet designated performance standards

- 300 (8) Using the most current ARMIS data provides a provides a meaningful and significant incentive for Qwest by creating a better match between the relative amount Qwest must place at risk and the prospective time period that the QPAP will be in operation.
- 301 (9) The Facilitator's proposal for a flexible revenue cap may unnecessarily restrict the Commission's ability to review the operation of the QPAP. Qwest's original proposal to use a flat 36 percent cap is appropriate to calculate the annual amount of revenue at risk of payment to CLECs.
- 302 (10) Table 2 of the QPAP demonstrates that payments made to CLECs will be very substantial at the sixth month of escalation. The threat of such payments should create sufficient incentive for Qwest to meet the performance standards for measures contained in the plan, and thus, sufficient assurance for CLECs that Qwest will meet the standards.
- 303 (11) Parity of service between CLECs and Qwest's retail customers is key to the advancement of local service competition. Qwest will not have sufficient incentive to minimize any disparity in provisioning services between the retail customers and CLECs unless Qwest removes the duration/severity, or 100 percent, cap from the performance measures in the QPAP calculated as averages or means.
- 304 (12) Neither Qwest's nor the Facilitator's proposals for when to trigger Tier 2 payments creates sufficient incentive for Qwest to perform. Qwest's argument that a time lag is necessary to correct continuing problems is doubtful, given the military style testing in the ongoing OSS test based on the same performance measures.
- 305 (13) The Facilitator's reference to payment escalation for Tier 2 payments is most likely to Table 5 which shows payments for per-measurement performance measures that escalate as performance worsens.
- 306 (14) WorldCom's argument for modifying the critical Z values is not persuasive.
- 307 (15) Payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.
- 308 (16) The monthly mock QPAP payment reports filed by Qwest shows there is little likelihood that the monthly cap will be reached, and provides no basis for including a carry-forward provision in the QPAP at this time.

- 309 (17) The Commission has independent authority to review Qwest's overall service quality. The Commission will not relinquish its authority over service quality, nor is it required to do so in approving the QPAP.
- 310 (18) We assert our jurisdiction over intrastate special access services, consistent with our decision in paragraph 28 of the *Special Access Order*, in the interest of ensuring that intrastate services are free from discrimination and barriers to competitive entry.
- 311 (19) The record in this proceeding establishes the need for Qwest to report its monthly provisioning and repair intervals for special access circuits.
- 312 (20) The QPAP must have sufficient measures in place that reflect a broad range of carrier-to-carrier performance at the time Qwest enters the long distance market, including measures for EELs, sub-loops, and line sharing.
- 313 (21) An electronic order flow-through measure is important to a CLEC's ability to compete with Qwest.
- 314 (22) Parties should use the ROC process for requesting new PIDs to pursue the development of new PIDs for inclusion in the QPAP.
- 315 (23) Higher payment levels for high-value services create a more appropriate incentive for Qwest to provide nondiscriminatory service.
- 316 (24) The Commission has authority under state and federal law to order Qwest to amend the QPAP during the six-month review process. In addition, the FCC stated in its *Verizon Pennsylvania Order* that it expects state commissions to play a prominent role in modifying and improving the performance metrics in performance assurance plans.
- 317 (25) It would be unreasonable to preclude or limit the Commission's authority to examine issues that may arise in the course of operation of the plan, as neither Qwest, the CLECs, nor the Commission has any experience, nor can they predict, how the plan will work once it is in operation in Washington.
- 318 (26) The scope of the six-month review should focus on fine-tuning the performance metrics in the plan, allowing other plan elements to be re-examined at the biennial review.
- 319 (27) This Commission is responsible for considering any changes to the plan to ensure the effectiveness of the QPAP and to resolve any disputes that may arise from its operation in Washington. We are not prepared to commit

ourselves, at this time, to the specific multi-state review process, or the Special Fund proposal set forth in the Report or Qwest's proposed plan.

- 320 (28) Relying solely on the volume of data points to determine whether payment levels should be adjusted may unduly limit the Commission's scope of review, as there may be other reasons to change payment levels that are not related to the volume of data points.
- 321 (29) The requirement that Qwest provide monthly performance data and projected QPAP payments to the Commission will provide a sufficient incentive for Qwest to perform well prior to filing its application with the FCC and receiving section 271 authority, and negates the need to make the QPAP effective upon state approval, or to require that payments should begin at an escalated level on the effective date.
- 322 (30) CLECs may be without remedy if the QPAP were to automatically terminate once Qwest leaves the long distance market. Section 18.11 of the CPAP provides an appropriate alternative, allowing the plan to expire in six years, but allowing payments to individual CLECs to continue subject to a review of their necessity.
- 323 (31) The recommendations in the Report to modify section 13.6 would severely and inequitably limit the alternative remedies available to CLECs. The language in section 16.6 of the CPAP is clear and explicit about the types of alternative remedies available to CLECs, and will likely avoid needless or protracted litigation about what remedies are available. In addition, the procedural exception in the CPAP is appropriate, given that we do not know how Qwest will perform or behave in the face of CLECs seeking alternative remedies.
- 324 (32) Allowing Qwest to determine whether to offset remedies and the amount of offset is inappropriate, as it may add another level of litigation when the offset could be addressed within a single case, be it before a court or regulatory commission. The language in section 16.7 of the CPAP appropriately addresses the issue.
- 325 (33) Public Counsel's request to modify section 13.3 to include a waiver process is reasonable.
- 326 (34) The concept of parity requires that parity measurements not be subject to force majeure payment exclusions.
- 327 (35) The terms of the SGAT should prevail in any conflict between the QPAP and the SGAT. The QPAP is being incorporated into the SGAT, and must conform to, not trump, the SGAT.

- 328 (36) The Colorado Hearing Examiner's approach to the form of payment provides the appropriate balance among the competing positions of the parties, such that Qwest will make cash equivalent QPAP payments to CLECs except when a non-disputed CLEC payment to Qwest is more than 90 days past due.
- 329 (37) There is no need to include a provision in the QPAP precluding Qwest from recovering QPAP payments in rates, because state and federal case law are sufficient to govern Qwest's behavior and provide this Commission with guidance.
- 330 (38) The QPAP should include a retention period, however, the language in section 14.4 of the QPAP is too vague and detracts from the certainty that this plan is intended to provide.
- 331 (39) Qwest's audit program in the QPAP, as originally proposed, is not sufficient to ensure a high level of confidence in the performance results that Qwest measures.
- 332 (40) Section 15.5 of the QPAP is not clear as to who would conduct an investigation, and more importantly, who would make the determination regarding CLEC responsibility, and only addresses investigation into Tier 2 misses, but not Tier 1 misses.
- 333 (41) It is appropriate for Public Counsel to receive copies of the monthly reports filed with the Commission.

IX. Order

- 334 THE COMMISSION ORDERS That Qwest must alter its proposed Performance Assurance Plan consistent with the following orders, prerequisite to securing a recommendation that its Performance Assurance Plan complies with the FCC's guidelines, and in order to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant it authority to offer in-region, interLATA service in Washington state:
- 335 (1) Qwest must modify section 12 of the QPAP to incorporate a flat 36 percent revenue cap, and to reflect the use of current ARMIS net revenue data.
- 336 (2) Qwest must modify section 6 of the QPAP to incorporate the Facilitator's recommendation for a six-month cap on Tier 1 escalation payments.

- 337 (3) Qwest must remove the 100 percent cap from the performance measures calculated as averages or means and contained in sections 8 and 9 of the QPAP.
- 338 (4) Qwest must clarify the language in the QPAP regarding the calculation of misses for parity to specifically incorporate the term “parity value” so that there will be no confusion at a later date as to how the calculations are performed.
- 339 (5) Qwest must modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet the Tier 2 performance standards.
- 340 (6) Qwest must incorporate the Washington state collocation rule into the QPAP, and ensure that the reference in the QPAP to CP-2 and CP-4 business rules is applicable only to matters not addressed in WAC 480-120-560. Qwest must also ensure that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT are consistent in applying the Washington rule.
- 341 (7) Qwest must revise section 12 to reflect that payments made to uphold the integrity of the QPAP, such as late payment penalties, should be excluded from the cap.
- 342 (8) Qwest must modify sections 13.8 and 12.1 of the QPAP to be consistent with the sections 11.2 and 16.8 of the CPAP, to allow the Commission to assess penalties where necessary to address service quality issues, but allow Qwest to dispute any payments it believes are duplicate.
- 343 (9) Qwest must begin filing monthly special access reports in Washington in the same month that Qwest begins special access reporting to the Colorado commission.
- 344 (10) Qwest must provide payment opportunities in the QPAP for the set of performance measures applicable to EELs, including OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7 and MR-8, as the standards are determined and must not wait until a six-month review to do so. Qwest must also add the sub-loop and line sharing standards to the QPAP as the ROC collaborative establishes them.
- 345 (11) Qwest must add an electronic flow-through measure to the QPAP in the Low Tier 1 and High Tier 2 payment categories.
- 346 (12) Qwest must amend the QPAP to include the payment table for high-value services proposed in Exhibit 1205 at page 12.

- 347 (13) Qwest must modify section 16.1 of the QPAP to strike “Changes shall not be made without Qwest’s agreement,” and add the following: “After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.”
- 348 (14) Qwest must modify section 16.1 to include the following language: “Parties or the Commission may suggest more fundamental changes to the plan; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the biennial review.”
- 349 (15) Qwest must revise section 16.1 and 16.2 of the QPAP to refer only to this Commission. Qwest must include new language in that section providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews. Qwest must delete the language in section 16.1 concerning the use of an arbitrator to resolve disputes, as well as language referring to the volume of data points.
- 350 (16) We defer our decision to participate in any multi-state six-month review, biennial review, or audit process until a later date. We will determine, and advise the parties of our determination of, the process for the six-month review, biennial review, and audit process no later than 60 days after FCC approval of Qwest’s application for section 271 authority.
- 351 (17) Similarly, we defer any decision whether to contribute a portion of Tier 2 funds to a Special Fund, and whether to require Qwest to contribute any funds, including a portion of the escalated Tier 1 funds, to the Special Fund until we determine our participation in a multi-state process. Until we determine whether and how we will participate in any multi-state process, Qwest must modify section 7.5 of the QPAP to reflect that Qwest must maintain an identified escrow account and deposit any payments of Tier 2 funds for Washington state into that account.
- 352 (18) Qwest must modify the QPAP to strike the language in section 11.3, and include language stating that nothing in the QPAP prohibits the Commission from directing the establishment of an identified escrow account or other fund, and or contributing a portion of Tier 2 funds to the account for the purpose of funding a multi-state process to review and audit the QPAP.
- 353 (19) We adopt the Facilitator’s recommendations that the QPAP should become effective upon the date the FCC grants Qwest section 271 relief for the state of Washington, and that payment levels should start at the one month level when the QPAP becomes effective.

- 354 (20) Qwest must modify section 16.2 of the QPAP to mirror section 18.11 of the CPAP, allowing CLEC payments to continue, subject to review, upon Qwest exiting the long-distance market.
- 355 (21) Qwest must strike the last sentence in QPAP section 13.6, as shown in Exhibit 1217. Qwest must add the election of remedies language proposed by AT&T and WorldCom, and include the portion of section 16.6 of the CPAP, as described above in paragraph 195 of this Order.
- 356 (22) Qwest must modify QPAP section 13.7 to incorporate the language in section 16.7 of the CPAP.
- 357 (23) Qwest must modify section 13.3 of the QPAP to provide (1) that the Commission is the entity that determines whether a request for waiver of payment obligations should be granted, and (2) that Qwest must file any waiver request with the Commission no later than the last business day of the month after the month in which payments are being disputed. Qwest must also delete the reference to “parity” in the last sentence of section 13.3 of the QPAP.
- 358 (24) Qwest must amend section 11.2 of the QPAP to adopt the language from section 12.2 of the CPAP which states: “All payments shall be in cash. Qwest shall be able to offset cash payments to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.”
- 359 (25) Qwest must strike the first three sentences in section 14.4 of the QPAP, and replace them with the following: “Qwest shall retain for a three year period (measured from the monthly payment due date) sufficient records to demonstrate fully the basis of its calculations for making payments under this PAP.”
- 360 (26) Qwest must modify section 15 of the QPAP as set forth in paragraphs 241 and 242 of this Order.
- 361 (27) Qwest must modify section 14.2 of the QPAP as follows: “Qwest will also provide to the Commission, *and relevant parties upon request*, a monthly report of aggregate CLEC performance results.”
- 362 (28) The Commission retains jurisdiction to implement the terms of this Order.

DATED at Olympia, Washington and effective this day of April, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is an Interim Order, and, as such, is not subject to the post-Order review processes of the Administrative Procedure Act. The Commission will, however, entertain all requests for clarification or for revision of any substantial error of fact and law. Because the opportunity is afforded at this juncture, parties will be foreclosed from raising such matters on the issues resolved herein without a showing of good cause for failure to raise the matter at this time

EXHIBIT D

Decision No. C02-399

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES
FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN COLORADO.

DECISION ON REMAND
AND OTHER ISSUES PERTAINING TO
THE COLORADO PERFORMANCE ASSURANCE PLAN

Mailed Date: April 10, 2002

Adopted Date: March 27, 2002

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I. BACKGROUND

A. Decision No. R02-41-I granted Qwest's Motion for Remand of Specified Colorado Performance Assurance Plan (CPAP or Plan), issues to the Special Master, Professor Phil Weiser. The remand included the following four issues:

- 1) the Commission's reservation of the right unilaterally to change the CPAP [CPAP §§ 18.1 et seq., 19.1];
- 2) the escalation clause for Tier 1 payments [CPAP § 8.2];
- 3) the inclusion of a monitoring measure for special access services; and
- 4) the definition of CLEC-affecting change [CPAP § 14.1].

The special access issue was remanded for the limited purpose of devising solutions for monitoring Qwest's special access services performance. The remand of the definition of CLEC-affecting change was for the limited purposes of making the CPAP language more practicable and for refining the definition of CLEC-affecting change.

B. On February 19, 2002 the Special Master submitted a Supplemental Report and Recommendation (Supplemental Report) on the remand issues and various CPAP implementation issues. The six parts of the Supplemental Report address: 1) requirements for data management processes; 2) change management requirements; 3) the escalation function; 4) the special access issue; 5) the changeability of the CPAP; and 6) assorted implementation issues.

C. Decision No. R02-173-I allowed participants to file comments on the Supplemental Report. Qwest; Joint CLECs comprised of AT&T Communications of the Mountain States, Inc. (AT&T), TCG Colorado, WorldCom, Inc. on behalf of its regulated subsidiaries (WorldCom), and Covad Communications Company (collectively, Joint CLECs); Time Warner Telecom of Colorado LLC (Time Warner); and the Colorado Office of Consumer Counsel (OCC) filed comments.

D. On March 27, 2002 the Commission held a decision meeting. This Decision addresses the remanded issues and the implementation issues. The Decision follows a similar format as previous CPAP orders: a synopsis of the Special Master's recommendation and a synopsis of the decision are given. Next, there is a recitation of the arguments in support of and against the recommendation, and then the Commission's reasoning for accepting or denying the recommendation.

II. INTRODUCTION

A. In this decision the Commission outlines a CPAP that, in its substance and execution, largely tracks the Final Report and Recommendation and the Supplemental Report and Recommendation of the Special Master. The participants in this docket display general agreement on the structure and principles of the CPAP.

B. This Order modifies and clarifies the CPAP where warranted. Fundamentally, however, this Order reaffirms the integrity of the CPAP initially recommended by the Special Master and modified by the hearing commissioner in Decision Nos. R01-997-I and R01-1142-I. This final recommended CPAP, embodied in the SGAT language of Attachment A to this Decision, represents this Commission's best effort - with ample input from all parties - to ensure that Qwest performs its interconnection and unbundling obligations under the federal Telecommunications Act of 1996 (the Act) after receiving in-region, interLATA authority under § 271.

C. Based on the Commission's decision with respect to the remand issues, new recommended SGAT language accompanies this Decision as Attachment A. This is the operative SGAT language Qwest must adopt before this Commission will recommend to the Federal Communications Commission (FCC) that it grant Qwest § 271 authority.

III. REMAND ISSUES

A. Requirements For Processes Used To Generate Data Measurement, Collection, And Reporting

1. Supplemental Report and Recommendation (SR&R at 1-3; 10)

a. The Special Master recommends a two-prong approach for requirements for Qwest's processes used to generate data measurement, collection, and reporting. If relevant data can be replicated under the old approach (non-fundamental change), then Qwest must note all changes on a public website, the Auditor shall evaluate all changes Qwest made to decide which, if any, should be scrutinized with reconstruction of data. If relevant data cannot be replicated (fundamental change), then before making any fundamental changes: 1) Qwest shall notify the Auditor and request an evaluation of the change; 2) the Auditor will inform the Commission if the change is permissible; 3) the Commission will have 15 days to take action to prevent the change. If no action is taken by the Commission, Qwest shall be allowed to make the change after the 15 day period. If the Auditor concludes the change would be adverse to the integrity of the data, then Qwest would be prohibited from making the change.

b. The Special Master further recommended the applicable penalty when Qwest fails to comply with this provision. If Qwest makes a fundamental change (i.e., data

cannot be replicated) without following the process, then a \$100,000 fine would be payable to the Special Fund. If Qwest cannot replicate reliable data, then the Independent Monitor shall use CLEC data to determine applicable payments, interest, and any late payments penalties. If Qwest fails to document changes accurately on the website, then a \$2,500 fine for each failure would be payable to the Special Fund.

c. The Special Master suggested that the sound practice for introducing PIDs should be to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

2. Decision

a. We accept the Special Master's recommendation on the two-prong approach for fundamental and non-fundamental changes to Qwest's Performance Measurement and Reporting System.

3. Discussion (*Qwest Comments at 2-4. Qwest SGAT §§14.1-14.3 at 13, deleted § 14.3 at 14, and deleted § 18.9 at 24. Joint Comments at 3-6.*)

a. Qwest endorses the Special Master's recommendation with four minor proposed modifications: 1) Qwest has made minor changes to Sections 14.1 and 14.2 to conform the

language that refers to Qwest's Performance Measurement and Reporting System more accurately to describe the processes Qwest uses to collect and report data; 2) Qwest asserts that the Commission should establish a 7-day deadline for the Auditor to act on changes that cannot be replicated; 3) Qwest should have the ability to appeal any decision by the Auditor to disallow the change; and 4) the Commission should make it clear that in the event approval for a change is denied, Qwest should not be liable for any inaccuracies in the data that result from an inability to obtain approval for the change.

b. Qwest also contends that the Special Master clarified that he did not intend to have PIDs and CPAP changes included in the Change Management Plan (CMP). Accordingly, Qwest argues that, references to the CMP in Sections 14.3 and 18.9 should be eliminated. Further, Qwest states that § 18.9 presumes that the parties would obtain pre-approval from an outside source, and therefore should be stricken.

c. The Joint CLECs indicate that they were not clear how the Supplemental Report and Recommendation treats CLEC-affecting changes to Qwest's performance measurement system. They assert that the language proposed in their comments concerning changes to Qwest's data measurement, data collection and data reporting processes is consistent with the Special Master's recommendation.

d. Qwest's proposed language more closely reflects the Special Master's recommendation. We address each of Qwest's four proposed "minor" modifications in turn. We accept Qwest's changes to §§ 14.1 and 14.2. The additional description of Qwest's Performance Measurement and Reporting System will be inserted. This description more accurately describes the underlying programs, tables and calculations used by Qwest in the generation of CPAP reports. This should not be an exclusive list. Therefore, the descriptive list should be preceded by the phrase "defined to include" rather than "defined to be". This allows for the addition of other elements in the future if the need should arise.

e. The March 27 decision meeting revealed the need for clarification in § 14.1. The Special Master recommended that Qwest be allowed to post all changes to its reporting system to a change log on a public website. We now clarify that this website should be easily accessible and dedicated to the CPAP so that CLECs, Office of Consumer Counsel, Commission Staff and other interested parties, including members of the public, will not have trouble locating the information. We suggest a site similar to the Change Management website, located at www.qwest.com/wholesale/cmp. There should be straightforward links to the CPAP monthly performance reports, monthly payment reports, the change log, the Auditor's reports and other CPAP-

related information. There should also be a confidential or password-protected part of this site that contains the CLEC individual monthly reports.

f. We do not accept Qwest's changes to § 14.3 to impose a seven-day turn around time for the Auditor's report on reporting system proposed changes. Without knowing the amount of work that these analyses might include, we will not impose a seven-day deadline for the Auditor's report to the Commission. The time frames for the Auditor's work can be negotiated in the relevant contract.

g. We partially accept Qwest's argument on the right to appeal any Auditor's decision to disallow a change. The Auditor will not be a decision maker under the CPAP. The Auditor will analyze the integrity of the data, and report those findings to the Commission or the Independent Monitor. Therefore, there is no "decision" to appeal. For the purposes of § 14.3, we will allow any interested parties to file comments on the Auditor's report with the Commission no later than seven days into the Commission's 15-day review period. Both the seven day comment period and the Commission's 15-day review period will begin when the Auditor files the report with the Commission and delivers it to Qwest. Further, Qwest shall post the report on the CPAP website immediately after receiving it from the Auditor. This will allow Qwest and other parties the opportunity

timely to file comments on both the proposed change and the Auditor's findings.

h. We do not accept Qwest's fourth proposed change to the Special Master's recommendation. Qwest's language goes too far in prospectively limiting its liability. If circumstances arise in which Qwest claims errors in the data are the result of a disallowed change, these should be dealt with on an individual case basis with Qwest retaining the burden of proving its position.

i. Qwest's comments also indicated that the Special Master clarified that PIDs and CPAP changes should not be included in CMP. We agree with this assertion. Qwest's removal of language in § 14.3 and the last two sentences of § 18.9 is appropriate. The language should be countered with the retention of the first sentence in § 18.9, and the inclusion of language in § 18.6.1, discussed later in the Escalation part of this order. (See §§ 14.1, 14.2, 14.3, and 18.9 in Attachments A and B).

B. Regulatory Oversight Over Change Management And CLEC-Affecting Changes

1. Supplemental Report and Recommendation (SR&R at 3-4)

a. Changes that affect CLEC access to Qwest's wholesale systems currently result in a \$1,000 fine per unapproved change. This "one-size-fits-all" approach is

inadequate. At present, there is no Commission approved change management regime with a definition for and sub-categorization of types of, CLEC-affecting changes. Once the Commission develops and approves a definition and classification regime for CLEC-affecting changes in the Change Management context, the CPAP should be modified accordingly. It should alter the penalty regime set out in § 14.3 to ensure that it is tailored to its dual role in ensuring adherence to the change management rules and compensating CLEC's for any harm from Qwest's failure to do so. The PO-18, GA-7, and PO-16 Performance Indicator Definition (PID) measures and the new payment obligation should not result in more than one payment for the same harm.

2. Decision

a. We accept the Special Master's recommendation on CLEC-affecting changes. Once a tiered definition is agreed to in the Change Management Plan it shall be incorporated into the CPAP. Appropriate penalty levels will be determined and ordered at that time.

3. Discussion (*Qwest Comments at 5-8. Joint Comments at 3-6.*)

a. Qwest does not agree with the Special Master's recommendation on this issue. Qwest asserts that the Special Master's intent to import the CMP process wholesale into the CPAP was never apparent to Qwest and is highly problematic.

The Special Master's recommendation that Qwest should be accountable for further payments than are already in PIDs PO-16, PO-18 and GA-7 (attendant to the CMP) raises several concerns.

b. Qwest opposes any CPAP provision that would hold Qwest financially liable for every obligation in the CMP regime. Instead, Qwest is willing to include obligations to pay affected CLECs \$1,000 for missing the initial notification requirement and \$250 for subsequent notification requirements for a software release. Qwest asserts, however, that CLECs must be required to demonstrate that they have actually been affected by the failure to issue the notification.

c. Qwest cannot agree to include in the CPAP, provisions providing payment obligations for failure to meet product and process notification obligations. Further, Qwest cannot agree to incorporate these new provisions at the six-month review.

d. The Joint CLECs do not separately discuss this issue in their comments. Rather, the Joint CLECs provided a definition of "CLEC-affecting" in their proposed language for § 14.1 that carries through their interpretation of the Special Master's recommendation on this issue.

e. At the conclusion of this entire § 271 process, there will be only two elements left with which to hold Qwest accountable for non-discriminatory treatment in providing

wholesale and resale services to CLECs. These two elements are the CPAP and the CMP. It follows, therefore, that these two plans overlap in many areas of the carriers' business to business relationships. The CMP covers a broad area of systems, products, and processes that, when changed, affect the way CLECs do business with Qwest. It is logical that Qwest should be held accountable for following the CMP timelines and milestones that it agreed to in the CMP redesign process.

f. The CMP redesign team is currently negotiating a leveled approach for defining CLEC-affecting changes, and the associated processes for notification, comments and implementation. When this task is agreed to and implemented by CMP, Qwest shall file this information with the Commission. The Commission will then propose penalties for each CLEC-affecting level, and allow for comments on those proposed penalties. Once comments are received, the Commission will issue an order establishing both the language to be included in the CPAP and the penalty amount(s) for each level. At that time, Qwest will be required to incorporate the language and penalties into the CPAP and into the monthly reports. Once Qwest receives § 271 approval from the FCC, as with all other penalties and payments, Qwest will be required to begin making payments to affected CLECs for these "misses" as well.

g. We agree with the Special Master that the flat \$1,000 fine for unapproved or unnoticed changes that minimally affect CLECs' business is too high. For changes that dramatically affect CLECs' business, the penalty is too low. Without seeing the final outcome from the CMP redesign group, we anticipate penalties ranging from \$100 to \$10,000 consistent with the commercial import of the change.

h. There is no additional language for the CPAP at this time. We do agree with the deletion of the portion of § 14.3 that currently includes the \$1,000 fine for unapproved CLEC-affecting changes. We do not agree to Qwest's proposed changes to PID PO-16.

C. Escalation

1. Supplemental Report and Recommendation (SR&R at 10-12)

a. The Special Master recommended that the escalation of payments not be capped at the six month level. He recommended that payments should continue to escalate for the duration of Qwest's out-of-compliance performance.

b. The Special Master recommended that any continuing escalation after 12 months should be contributed entirely to the Special Fund. This, in his opinion, would protect against a windfall for the CLECs.

c. The Special Master suggested, as noted above, that the sound practice for introducing PIDs should be to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach should also be to introduce new PIDs as "diagnostic" measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

d. To the extent that a PID continues to trigger an escalating payment past six months, the Special Master recommended that the Commission automatically examine this measure as part of a six-month review to consider whether the failure to comply reflects continuing deficient performance or some quirk resulting from a poorly defined PID.

e. The Special Master further recommended that, once a payment reaches the nine-month mark, the CPAP should provide for an accelerated step-down method. After at least nine months or more of continuing deficient performance, three consecutive months of acceptable performance should bring the base penalty level to that of the six-month mark. After three more consecutive months of acceptable performance (for a total of six consecutive months of complying performance), the payment level should go back to the base amount.

2. Decision

a. We accept the Special Master's recommendation with the exception of the accelerated step-down process.

3. Discussion (*Qwest Comments at 12-14. Qwest SGAT § 18.6(2) at 22 and §§ 8.2-8.4 at 8. Joint Comments at 16-18. OCC Comments at 10.*)

a. Qwest continues to believe and make arguments that the six-month cap, modeled on the Texas Plan, lies well within the zone of reasonableness established by the FCC for its review of such plans. According to Qwest, the proposed changes by the Special Master would mitigate to some extent, Qwest's concerns about the financial liability associated with unending escalation in payments. Qwest's claims the Supplemental Report does not address head-on what should be done when non-conforming results are caused by PID design rather than a lack of incentive on Qwest's part. If payments are allowed to escalate, Qwest argues, the escalation should be included in the 10% collar endorsed by the Special Master in his recommendation on Changeability.

b. Qwest's proposed language for §§ 18.6 (2), 8.2, 8.3, and 8.4 includes Qwest's retention of a six-month maximum multiplier, the accelerated step down approach, the payment of 100% to the Special Fund after the 12 month

multiplier and the inclusion of the escalated payments beyond the sixth month to be included in the 10% financial collar.

c. The Joint CLECs do not agree that the escalated payments would lead to a windfall beyond the 12-month multiplier. If the PIDs are sufficient to determine if Qwest has met the requirement of the Act, they should also be sufficient to determine if Qwest continues to do so after § 271 entry is granted.

d. The Joint CLECs' position on the Special Master's accelerated step-down is that, it is too precipitous a step-down. For instance, if Qwest has missed a measure bringing them to the 14 month mark and then subsequently has three months of compliance, Qwest would drop all the way back to the six-month mark. Also, the Joint CLECs assert that the SGAT language needs to be more clear that when Qwest is stepped down to the six-month mark, but then is out of compliance again, the escalation process would continue upward for each miss and that Qwest is only eligible for the accelerated step down again after the nine-month mark with three consecutive months of compliance.

e. The Joint CLECs, while they do not necessarily agree with it, have proposed language that mirrors the Special Master's recommendation on escalation.

f. The Office of Consumer Counsel commented on the Escalation issue as well. It states that the OCC continues

to support the escalation of payments clause as ordered by the hearing commissioner. However, the Special Master's recommendation to require a review of escalated payments for six-month reviews and escalated step down procedure is a reasonable compromise to which the OCC has no objection.

g. We accept the Joint CLECs' proposed language for §§ 18.6.1, 8.2 and 8.3 with some minor modifications. We reject the accelerated step-down process.

h. We are exasperated by Qwest's attempt once again to include a six-month cap on the escalation of payments, even with the concessions offered by the Special Master. We do not agree with Qwest that a six-month cap on escalation is reasonable, nor do we agree that the Special Master's recommendation does not address what should be done when non-conforming results are caused by PID design rather than Qwest's lack of incentive.

i. The Special Master has recommended that new PIDs should be introduced through a collaborative forum before bringing those PIDs to the Commission for incorporation into the CPAP. In addition, he states that the preferred approach should be to introduce these PIDs as diagnostic for some time to allow for the reporting of actual data before determining the relevant standard and penalties. This language, inserted in § 18.6.1,

should minimize the likelihood of poor PID design resulting in many months of escalated payments.

j. As for existing PIDs, already agreed to, fully audited, measured, and reported at the Regional Oversight Committee (ROC), we fail to see how Qwest will be able to pass the ROC-Operation Support System (OSS) test, given that it is a military style (*i.e.*, pass or retest) test, if there are these "poorly defined" measures for which Qwest continues to be non-compliant. However, if this happens to be the case, Qwest will be able to argue at the first six-month review for the removal or change of these PIDs since the CPAP language will require, in § 18.6.1:

If, pursuant to Section 8.2, a PID continues to trigger a payment escalation for six months or more, that PID shall automatically be reviewed pursuant to this Section, in order to determine if there are issues with that PID, such as poor definition, that need to be addressed.

k. In our review of the accelerated step-down process recommended by the Special Master, we became increasingly aware from the Joint CLECs' comments, as well as our own Staff's input, that the practical implementation and tracking of such a process would be arduous at best. The current step-down process, without any acceleration, already has the possibilities of step-downs, step-ups, and maintenance of the status quo depending on Qwest's performance in the instant month

and some numbers of previous months for each and every performance measurement for each and every CLEC. The accelerated step-down process would multiply, and complicate, this tracking work. In keeping with the goal of having this Plan be as self-executing and easy to understand as possible, we decline to accept the accelerated step-down process as part of the CPAP.

1. We accept the Special Master's recommendation that if the escalation payments for a particular submeasure continue for more than 12 months, the escalation payments owed to the CLEC will be fixed at 50% of the 12 month payment. This fixed amount will continue until Qwest's satisfactory performance for the submeasure, results in Qwest paying at the 11 month level. At that point, the process in § 8.2 (the step-down process) will apply. All amounts in excess of the CLEC payments for month 12, will be paid to the Special Fund. The Special Master's original Report and Recommendation dated June 8, 2002, noted:

In an ideal world, the Tier I.X payments should be calibrated to reflect the actual market harm and not simply a very rough basis upon which to award payments. The current state of the record in this proceeding, however, provides no reasonable basis to approximate the actual market harm to companies that suffer deficient performance. Unfortunately, no parties have carefully documented the payments necessary to address different types of harms (such as these examples) and thus the Tier I.X payments reflect merely a very rough and unrefined approximation of what compensation is owed.

The state of the record has not changed since the Special Master made his observation. With no better idea of commercial harm, we cannot even begin to speculate on the appropriate penalty level.

m. At the 12-month point, an affected CLEC will receive \$1,350 for a miss of a Tier 1A submeasure. (The other \$1,350 will be paid to the Special Fund). It seems likely that this \$1,350 covers actual costs of the CLEC for Qwest's failure to perform and most likely, some punitive damages as well. By continuing Qwest's payment responsibility under § 8.2 and just shifting who actually receives the money, Qwest will still have the incentive to fix the problem rather than let it continue.

n. At month 13 and after, the CLEC affected by these escalated misses will still receive 50% of the 12 month payment. It is only the additional 13+-month penalty amounts that will be paid entirely to the Special Fund. For instance, if Qwest has missed a Tier 1A measure for 13 months consecutively (not counting any severity multiplier), an affected CLEC would receive \$1,350 in month 13 and the Special Fund would receive \$1,350 plus \$225, or \$1,575. In month 14 the CLEC would receive \$1,350, and the Special Fund would receive \$1,575 plus \$225, or \$1,800; and so on.

o. There are several sections throughout the CPAP that refer to the escalation payments as 50% to the CLECs and 50% to the Special Fund. These sections have been changed in

Attachments A and B to reflect the above decision. (See Attachments A and B §§ 2.1, 8.3, 10.2, 10.4 and 16.5.)

D. Special Access

1. Supplemental Report and Recommendation (SR&R at 12-17)

a. The Special Master recommends that the Commission define the type of special access circuits that would be eligible for monitoring and reporting as either: 1) those used primarily for local services or 2) those used to a nontrivial degree (e.g., 10% for local service).

b. Qwest needs to develop the capability to measure its performance on the relevant pre-ordering, ordering, provisioning, and maintenance and repair functions for special access circuits. Therefore, according to the Special Master the Commission should set forth the scope of any measurement and reporting obligations imposed on Qwest. The relevant set of measures are: PIDs OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, and MR-8. Also, PIDs PO-5 and PO-9 are relevant measures, unless there is a compelling reason for not doing so. A previous CPAP decision (Decision No. R01-997-I) required Qwest to monitor and report special access services for PIDs OP-8, MR-3, and MR-9. The requirement to measure these should be eliminated because they are not appropriate measures of special access.

c. There are two ways to identify monitored special access circuits: 1) the use of a project field (this would have to be made available in both Qwest's ordering and maintenance and repair systems and the CLECs would need to be responsible for entering the relevant field into both the ordering system and the maintenance and repair system,) or 2) the use of different Access Carrier Name Abbreviation (ACNA) codes to classify use of special circuits as either long distance or local.

d. It is conceivable that the terms for monitoring and reporting on special access circuits will be resolved through business-to-business negotiations. If an agreement is negotiated and is submitted to the Commission, the Special Master recommends that the Commission should determine if that business-to-business agreement has substantially addressed the concerns raised by CLECs, such that there is no need to measure special access services.

e. If a business-to-business agreement is not submitted, the Special Master recommends that the Commission should ask for a joint (Qwest and CLECs) submission of an implementation plan or that the Commission should engage in baseball-style arbitration so that an implementation plan can be adopted.

2. Decision

a. We reject the recommendation to ask for a joint submission of an implementation plan. We also reject the recommendation that the Commission should engage in baseball-style arbitration. Instead, the Commission shall require Qwest to develop the capability to measure and to begin monitoring its performance for special access circuits by use of the project field within 60 days of the mailed date of this order. It is also acceptable if a CLEC and Qwest agree to the use of an ACNA code as long as the CLEC and Qwest also agree to a date certain to develop the capability to measure and to begin monitoring special access circuits through use of the ACNA code.

b. By entering the project field into Qwest's provisioning system or maintenance and repair system, CLECs would be self-certifying that the special access circuit is used for local service.

c. Qwest shall monitor and report special access circuit performance for PIDs OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, MR-8, and PO-5¹. The standard shall be diagnostic. Qwest shall take only the exclusions listed in the PID for each measure.

¹ We shall not require monitoring and reporting of special access circuits for PO-9. See discussion for EELs.

d. Reports shall be delivered by Qwest to each individual CLEC, the Commission, and the Office of Consumer Counsel at the same time and by the same method it delivers performance reports for the CPAP measures pursuant to § 13.2.

3. Discussion (Qwest Comments at 14-19. Joint Comments at 18-21. Time Warner Comments at 3-6.)

a. In order for meaningful assessment of special access circuit performance, Qwest argues that, the standard should be at least 33% local usage.

b. Qwest asserts that the use of the project field method would not allow CLECs to designate when a special access circuit is used by a CLEC in lieu of a UNE. Qwest opposes the ACNA code method because it would require each CLEC to have a separate ACNA code to distinguish special access circuits. According to Qwest, these separate ACNA codes would have to be assigned through Telcordia Practice. Further, Qwest would have to make system changes that could take 90 days or more. Qwest argues that it would not be reasonable to expect it to go back and assign different ACNA codes to the over 306,000 special access circuits installed in Colorado.

c. Qwest contends that, for contractual reasons, there is no opportunity to negotiate a business-to-business agreement. Qwest states it is willing to participate in an informal investigation to determine the need for, and

structure for reporting, information on special access provisioning. As a prerequisite, however, Qwest contends that the CLECs should be required to establish factual predicates about the need for special access measures and their ability to verify the local usage on their special access orders.

d. The Joint CLECs favor the broader (non-trivial) local usage standard suggested by the Special Master. However, AT&T and WorldCom recommend that the Commission adopt a standard specifying that any amount of local traffic would qualify a CLEC's special access order for monitoring of Qwest's performance because exact percentages of local usage cannot currently be determined.

e. The Joint CLECs agree with the Special Master's recommendations on which measures should be designated for special access circuit performance.

f. The Joint CLECs assert that the Commission does not need to choose one of the two methods: project field or ACNA code, for identifying which special access circuits should be subject to monitoring. The Joint CLECs explain that the industry practice of reaching mutual agreement to modify the Access Service Request (ASR) format would apply here. The Joint CLECs prefer the ACNA code method but would not want it imposed on any CLEC which prefers the project field method.

g. The Joint CLECs disagree with the Special Master's suggestion that implementation details be the subject of additional filings or baseball-style arbitration before the Commission. The Joint CLECs are skeptical that business-to-business negotiations might take place because of Qwest's position on EEL conversion.

h. Time Warner favors the broader (non-trivial) local usage standard suggested by the Special Master.

i. Time Warner agrees that PIDs OP-8, MR-3, and MR-9 are not relevant special access measures. Time Warner further agrees with the Special Master's recommendation on relevant special access measures.

j. Time Warner recommends adoption of the project field method because it does not use multiple ACNA codes for its business. Alternatively, Time Warner suggests the Commission could permit CLECs to use either the project field or different ACNA codes.

k. Time Warner does not believe that additional implementation details should be the subject of more filings by parties or be subject to baseball-type arbitration.

l. The comments suggest that the Commission should not expect any business-to-business agreements to be presented to it. The comments imply that it would not be productive for the Commission to subject the parties to

additional process such as joint submission or baseball-style arbitration. Qwest's suggestion that an informal investigation be conducted to determine the need for, and structure of reporting information on special access provisioning ignores that the special access issue was remanded for the limited but specific purpose of devising solutions for monitoring Qwest's special access services performance. We find that the record contains sufficient information to resolve this issue, as set forth in the above decision.

E. Changeability: Review Processes

The Special Master's recommendations for changeability are separated into three areas: 1) review processes, 2) financial collar, and 3) Commission authority and Qwest's right to judicial review.

1. Supplemental Report and Recommendation (SR&R at 17-22)

a. Regarding review processes, the Special Master recommends that the core aspects of the CPAP should be fixed until the three-year review. Therefore, the basic framework subjects that should be off-the-table for six-month reviews are:

- statistical methodology;
- rules regarding the cap (financial collar);
- duration of the CPAP;
- payment regime structure (tiers, base amounts, payment escalation, payment severity, and specified payment and fine amounts);
- legal operation of the CPAP;
- Independent Monitor's operation; and,

- any proposal that does not directly relate to measuring and/or providing payments for non-discriminatory wholesale performance.

Subjects on-the-table at six-month reviews are:

- variance tables may be added for new Tier 1A measures (to the extent possible, new variance tables should follow the method used to create existing variance tables);
- payment amounts may be added for new Tier 2 measures;
- payment amounts may be added for violations of change management requirements (each level would need to be defined and assigned); and,
- the Independent Monitor function may be assigned to an ALJ.

Any subject not deemed "off-the-table" is fair game at the six-month review.

b. The Special Master also recommends that the basic framework of the CPAP, as well as refinement of the payment amounts in order to bring them into line with any evidence of the actual marketplace harm that results from deficient performance, should be revisited at the three-year review and six-year review.

c. The Special Master recommends participating in a region-wide or multi-state forum for maintaining (*i.e.*, modifying, adding, deleting) PIDs after the end of the ROC-OSS test. If the Commission elects to participate in such a forum, he also recommends using monies from the Special Fund to contribute to any administrative costs of such a forum.

d. The Special Master finally recommends the Commission clarify its intent with respect to the six-year review and termination of the CPAP.

2. Decision

a. We accept the Special Master's recommendations on review processes. Core aspects of the CPAP shall be off-the-table at six-month reviews and shall remain fixed until the three-year and six-year reviews.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest raises concerns that the Special Master's use of "presumptively" to describe off-the-table subjects could allow for changes. Qwest asserts that the off-the-table subject of "any proposal that does not directly relate to measuring and/or providing payments for non-discriminatory performance" should not be construed to mean that payment issues would be back on the table. However, Qwest wants the escalation payment limitation to be on-the-table, as an exception to this subject. Qwest asserts subjects that are on-the-table for six-month reviews should be clearly defined and has proposed language for § 18.4 to indicate Staff's report to the Commission is limited the issues that are "clearly" defined in its proposed § 18.6.

b. Qwest argues that the CPAP must require parity standards for measurements for which there is a retail comparative. Qwest proposes language for § 18.6(1) reflecting this.

c. Qwest asserts that the only legitimate provisions that should remain in effect after the six-year review are the Tier 1A payment provisions. Qwest proposed revisions to § 18.10 to clarify this.

d. Qwest argues that a portion of § 7.5, a portion of § 10.6 and all of § 16.9 must be deleted to reflect the changeability recommendations of the Special Master.

e. The Joint CLECs contend that their proposed language changes to §§ 18.6 and 18.7 reflect the Special Master's recommendations on changeability of the CPAP.

f. The OCC does not object to "off-the-table" items being removed from the six-month reviews as long as these items are clearly on-the-table for the three-year review.

g. The OCC supports explicit Commission authority to continue or sunset the plan in its entirety, or to maintain certain aspects of the plan and sunset others. The OCC proposed replacement language for § 18.11.

h. The Joint CLECs' proposed language better captures the recommendations of the Special Master. However, the Joint CLECs do not offer language on the specified

exceptions for the six-month review. We adopt the Joint CLECs' language with the addition of the specified exception language and some minor modifications (see §§ 18.6 and 18.7 in Attachments A and B). We accept Qwest's proposal to delete § 18.8 and part of § 18.9 (see §§ 18.8 and 18.9 in Attachments A and B). We deny Qwest's proposal to delete portions of §§ 7.5 and 10.6 and to delete all of § 16.9. We disagree with Qwest's argument that these changes reflect the Special Master's recommendations on changeability.

i. We concur with the Special Master's recommendation on participation in a multi-state forum for maintaining PIDs after the end of the ROC-OSS test. Section 18.6.1 reflects our concurrence. We are not opposed to using monies from the Special Fund to contribute to any administrative costs of such a forum. However, until the details of a collaborative forum have been worked out, the CPAP shall not include language designating that the Special Fund shall be used to fund the collaborative forum administrative costs.

j. To clarify the Commission's intent with respect to the six-year review and termination of the CPAP, Section 18.11 shall be modified to clarify the sunset of the CPAP. Tier 1A will continue until further order of the Commission. All provisions of the CPAP not related to

continuing the Tier 1A regime will sunset at the end of six years, unless the Commission orders otherwise.

(See § 18.11 in Attachments A and B.)

F. Changeability: Financial Collar

1. Supplemental Report and Recommendation (SR&R at 4-10)

a. The Special Master recommends that the CPAP include a financial collar of 10 percent to be implemented as follows:

- requires Qwest to calculate separately the payments owed by it under the CPAP that was in effect before changes made at a six-month review;
- requires Qwest to calculate the payments owed by it under the revised CPAP;
- authorizes Qwest to scale down the payments to the affected CLECs and to the Special Fund if the revised CPAP would require more than a 10% increase in total payments;
- requires "above the collar" payments to be made from the Special Fund to any CLEC affected by this mitigation of payments;
- if the revised CPAP calls for total payments above the collar, then requires the unchanged CPAP be used as the benchmark for purposes of setting a collar for the next six-month period;
- if the revised CPAP calls for total payments below the collar, then requires the revised be used as the benchmark for setting a collar for the next six-month period.

2. Decision

a. We accept the recommendation to add a 10 percent financial collar.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest contends that its proposed language for § 18.8 reflects the recommendation of the Special Master for the financial collar. The Joint CLECs likewise assert that their proposed language for §§ 18.7.2, 18.7.3, and 18.7.4 reflect the recommendation for the financial collar.

b. Both sets of proposed language reflect the recommendation for the financial collar. We adopt Qwest's proposed language with some modifications because the language is clearer on the calculation and application of the financial collar. We shall add to it language proposed by the Joint CLECs stating:

If the Special Fund does not contain sufficient funds to provide such payments to CLECs, Qwest shall make up the difference. Any funds that Qwest provides to make up the difference will be offset against Qwest's future Special Fund liabilities.

(See § 18.8 in Attachments A and B.) This additional language better reflects the Special Master's intent to use the Special Fund for mitigation of payments to any affected CLEC, while limiting Qwest's liability in a given year.

G. Changeability: Commission Authority And Qwest's Right To Judicial Review

1. Supplemental Report and Recommendation (SR&R at 4-10)

a. According to the Special Master, Qwest's filing of the CPAP sets forth the framework that empowers the Commission to enforce and to modify its terms. Qwest cannot later challenge the terms of its initial filing. Nevertheless, the initial CPAP does not waive later as to challenges by Qwest related to subsequent changes to the CPAP.

b. The Special Master recommends that, if the Commission orders a change on completion of a six-month review of an off-the-table subject without Qwest's consent, the effect of any such change should be automatically stayed during the course of any judicial challenge to the Commission's order. The Special Master states that, at the three-year review, the Commission will not be able to require Qwest to undertake any new obligations. Rather, the Commission will be able to give Qwest the option of filing the new, recommended regime or of keeping the old regime. If Qwest opts not to file the new regime, the Commission can order it (or any aspect of it), subject to judicial review. The Special Master recommends that this order of the Commission not be automatically stayed.

2. Decision

a. The Commission accepts the Special Master's recommendation regarding the automatic stay during any judicial challenges of changes ordered by the Commission at the completion of a six-month review to off-the-table subjects. The Commission agrees with the Special Master that an order requiring changes to the CPAP on completion of the three-year review should not be automatically stayed. The Commission disagrees with the Special Master with respect to treatment of Commission-ordered changes to the CPAP at the three-year review.

3. Discussion (*Qwest Comments at 19-26. Qwest SGAT § 18.4-18.10 at 21-25. Joint Comments at 21-24. OCC Comments at 6-10.*)

a. Qwest proposes language for § 18.5 that indicates that the Commission must commence a proceeding or hearing to resolve disputed issues. Qwest asserts this requirement would preserve a record on appeal.

b. Qwest asserts that the CPAP should clearly state that the Commission cannot order changes to the CPAP that are directly related to measuring and/or providing payments for non-discriminatory performance that are not required under § 251 of the Act. Qwest argues that this category is acceptable if it does not include the words "and/or providing payments" and with the clarification that the category is dependent upon the

requirements of § 251. Qwest proposes language in § 18.6(3) reflecting this.

c. Qwest proposes addition to § 18.6 of a general reservation of rights provision to provide assurance that Qwest is not subject to a claim of waiver upon appeal at the six-month review.

d. Qwest agrees with the recommendation automatically to stay during judicial review changes to off-the-table subjects ordered by the Commission upon completion of a six-month review. The language proposed by Qwest for § 18.7 reflects this agreement. Qwest disagrees with the Special Master that there should not be an automatic stay of changes ordered by the Commission after completion of a three-year review. The language proposed by Qwest for § 18.9 reflects this disagreement.

e. Qwest argues that all changes that are approved upon appeal should be limited to the 10% financial collar. Qwest proposes language for §§ 18.7 and 18.9 reflecting this.

f. The Joint CLECs contend that their proposed language changes for §§ 18.7.1 and 18.10 reflect the Special Master's recommendations.

g. The OCC objects if the Special Master's recommendation is that the CPAP contain no explicit authority

for the Commission to impose new obligations at the three-year review. According to the OCC, the current CPAP provides that payment amounts can be revised and that the basic framework of the CPAP can be modified at the three-year review. The OCC asserts that this language gives the Commission authority to impose new obligations at that time.

h. The Commission adopts the Special Master's recommendation concerning the automatic stay of a Commission decision, arising from a six-month review, which changes an off-the-table aspect of the CPAP. Because the Commission's authority here is a *sui generis* mixture of federal and state authority, the automatic stay provision provides a reasonable brake on the Commission's authority. The netherworld of state commission exercise of federal remedial authority should not be used indiscriminately to ratchet a performance regime. The stay provision is limited in scope, duration and purpose. An automatic stay should be invoked rarely, if ever, yet provides valuable assurance that the limits contained in Section 18.7 will be observed. The provision implements, and gives effect to, specific contract language (i.e., Section 18.7) which limits the areas which can be changed at a six-month review. If the Commission determines that it will change an off-the-table area notwithstanding Section 18.7, the automatic stay is an appropriate constraint, particularly because it will not be

invoked unless there is judicial review of the Commission's decision. In permitting the automatic stay provision, we emphasize in the strongest possible terms that a provision of this type is not appropriate or reasonable in any other setting or circumstance. This process is *sui generis*, and so is the automatic stay provision. We do not expect to see, and will not approve, an automatic stay provision in any other situation (see § 18.7.1 in Attachments A and B).

i. We now turn to the Special Master's recommendation concerning the procedure to be used following a three-year review and to Qwest's proposal for an automatic stay of an order, arising from a three-year review, which changes the CPAP. We adopt neither the Special Master's suggested process nor Qwest's requested automatic stay. In our view, a Commission order arising from the three-year review is just that, a Commission order. As with any other Commission order, Qwest or any other party can accept the order or can institute a judicial review action. There are established processes for obtaining a stay of a Commission order when judicial review is sought. Thus, we find that the Special Master's recommendation adds an unnecessary element of process. Further, at the three-year review, all aspects of the CPAP can be reviewed and changed. This distinguishes the three-year review (which has no limit on what can be changed) from the six-month review (which has such a

limit) and supports our conclusion that an automatic stay of a three-year review order is neither appropriate nor reasonable (see § 18.10 in Attachments A and B).

IV. ASSORTED IMPLEMENTATION ISSUES

A. Variance Factors And The One Free Miss Rule, Missing Variance Factors, And Other Variance Issues

1. Supplemental Report and Recommendation (SR&R at 4-6)

a. The Special Master recommends that the current variance table be changed because it uses two rules where one would do. The current table includes lower than otherwise appropriate variance amounts on the understanding that Qwest was permitted "one free miss" before it would be required to pay CLECs for deficient performance. The "one free miss" rule makes sense for performance measures that rely on a benchmark to set the standard for performance, but is redundant for parity measures where the variable table itself provides for the necessary "slack factor." The Commission should remove the one free miss rule from the CPAP, and from its use in Tier 1A, Tier 1B and Tier 1C, except where used in association with performance measures in which a benchmark sets the standard. The variance table should be adjusted to reflect this change.

b. The Special Master goes on to say that this variance table method is not a perfect step. To address the lack

of dynamism in this method, he recommends that the Plan include a provision that uses for a "shadow method" of calculation of payments for small sample sizes (i.e., 1-30) based on the permutation test in Tier 1B. In practice, this means that the CLECs will be provided with the results calculated using both the variance factor method and the shadow method, and will receive payments based on whichever one is more beneficial to them.

c. During the course of meetings with Qwest and other parties on these remand issues, the Special Master learned of certain variance factors that were missing for several parity measures contained in Tier 1A. For the long term, he recommends that, where a variance factor has yet to be calculated or where there are not sufficient data to use in developing one, the relevant Tier 1A measures should rely on the same statistical methodology used for Tier 1B and Tier 1C (that is contained in §§ 4 and 5 of the Plan). For the short term, he recommends additions for these known missing factors.

d. Finally, in a step to guard against the lack of predictability for Qwest that results from these changes, § 10.3, which governs the special severity for Tier 1A, should be amended to provide for payments on the lower of the amount generated by the old variance factor method (with the one free

miss rule) and the new variance factor method as set forth in his recommendation.

2. Decision

a. We accept the Special Master's recommendations as to the variance factors.

3. Discussion (*Qwest Comments at 8-9. Qwest SGAT §§ 6.2 and 6.4 at 5, Table 2 at 4-5, and § 10.3 at 9. Joint Comments at 6-10.*)

a. Qwest's language for §§ 6.2 and 6.4 and Table 2 conforms with the Special Master's recommendations and is accepted with minor modifications for clarification as contained in Attachments A and B.

b. The Joint CLECs agree with the Special Master's recommendations as well, but their proposed language does not follow the recommendation as clearly as Qwest's, with the exception of § 10.3.

c. In Qwest's comments on § 10.3, Qwest asserts that the Special Master inadvertently referred only to Tier 1A measures here, and should have included Tier 1B measures. Qwest has provided language that refers to both.

d. The Joint CLECs do not make this assertion nor do they include Tier 1B in their proposed language for this section.

e. We agree with the Joint CLECs, and will use their proposed language with minor modifications for this

section. The inclusion of Tier 1B in this new comparison method of the old variance factor table and the new table makes no sense. The variance factors are only used in the CPAP's statistical methodology for Tier 1A measures and, therefore, Tier 1B measures should not be included in this new method for comparison of variance tables (see § 10.3 in Attachments A and B).

B. Language Clarification

1. Supplemental Report and Recommendation (SR&R at 7-8)

a. The Special Master makes several recommendations regarding language clarifications through out the CPAP. These recommended changes are to §§ 4.1, 4.2, 5.2, 6.1, 6.3, 7.1, and 13.6.

2. Decision

a. We accept the Special Master's recommended changes to all these CPAP sections. (See Attachments A and B at §§ 4.1, 4.2, 5.2, 6.1, 6.3, 7.1, and 13.6.)

3. Discussion (Qwest Comments at 9. Qwest SGAT § 4.2 at 1, § 5.2 at 3, § 6.1 at 3, § 6.3 at 5, § 7.1 at 5-6, and § 13.6 at 12. Joint Comments at 10-11.)

a. No party objects to the recommended changes of the Special Master for this clarifying language. Qwest provided proposed language in its comments that conforms to the recommendations. In §§ 6.3 and 7.1 Qwest adds clarifying phrases

for reference to the Special Master's recommendations. We accept these additions.

b. In its proposed language for § 13.6, Qwest adds the sentence:

If an audit is in progress, Qwest is not precluded from revising the reported data without incurring the payments required by Sections 13.4 and 13.5 if the audit is focused on a different area of performance measurement.

We do not agree with this addition. This language confuses the understanding of the section and will not be allowed.

C. Computation Issue Regarding Zone 1 And Zone 2

1. Supplemental Report and Recommendation (SR&R at 8-9)

a. The Special Master recommends that the CPAP follow the suggestion of the rural-based CLECs and the model set out in the multi-state PAP, that is: combine zone 1 and zone 2 for purposes of statistical testing. Specifically, he recommends adding the following sentence to the last paragraph of § 4.3:

When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

He also recommends deleting the last sentence of § 5.1 and modifying § 7.5 as follows:

For purposes of severity and duration penalties (Tier 1Y), a "measure" shall be at the most granular level of product-reporting disaggregation, except where otherwise specified. For purposes of statistical

comparison and occurrence calculation, a measure shall be at the most granular level of product-reporting disaggregation, except where otherwise specified.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (*Qwest SGAT § 4.3 at 5, § 5.1 at 3, and § 7.5 at 7. Joint Comments at 11.*)

a. Qwest's proposed SGAT language agrees with the recommendation, except for the addition of the word "these" in § 4.3. The Joint CLECs believe that the sentence recommended for addition to the last paragraph of § 4.3 should instead be added to the last paragraph of § 4.2.

b. In earlier efforts to clarify language on this matter it seems the language added to § 7.5 was inconsistent with language included in § 5.1. We correct that inconsistency now. We disagree with the CLECs that the additional sentence be added to the last paragraph of § 4.2. Section 4.3 deals with sample sizes smaller than 30, and § 4.2 deals with sample sizes greater than or equal to 30. Because this combination "follows the suggestion of rural-based carriers," we conclude that the sentence should be added to § 4.3. (See §§ 4.3, 5.1, and 7.5 in Attachments A and B).

D. Unnecessary Measures

1. Supplemental Report and Recommendation (SR&R at 9)

a. The Special Master recommends that PIDs PO-3A-2 and PO-3B-2 be excluded from the CPAP because these measures are calculated and reported on a 14-state basis.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (Qwest SGAT Appendix A at 33.)

a. No party objects to the recommended exclusion. PIDs PO-3A-2 and PO-3B-2 will be deleted from Appendix A of the recommended SGAT language.

E. Establishment Of The Special Fund

1. Supplemental Report and Recommendation (SR&R at 9)

a. The Special Master recommends that the Commission designate a specific employee to direct Qwest how to manage the escrow fund set up for this purpose.

2. Decision

a. We accept the Special Master's recommendation.

3. Discussion (Qwest Comments at 10. Qwest SGAT § 10.4 at 9.)

a. Qwest agrees with the Special Master and recommends that the administration of the Special Fund should be addressed in a Memorandum of Understanding (MOU) that would include provisions for auditing the disbursement process and payment of expenses and taxes from the fund. Qwest proposes language for addition to § 10.4 reflecting its recommendation.

b. The Commission and Qwest shall enter into a MOU for administration of the Special Fund which shall identify: individuals authorized access to the account; disbursement and auditing procedures; provisions for fund expenses and tax liabilities to be paid from fund assets; and other provisions necessary for administration and operation of the fund. The CPAP will be part of a contract between Qwest and a CLEC, not Qwest and the Commission. Therefore, we reject Qwest's proposal to add language to the CPAP to reflect this. Once the MOU is negotiated and signed by representatives of Qwest and the Commission, it will be a public document available for the CLECs and any other interested party to review.

F. Miscellaneous Administrative Issues

1. Supplemental Report and Recommendation (SR&R at 9-10)

a. With respect to reports listing CLEC-specific performance results, the Special Master recommends that

the Commission order Qwest to file such reports upon request by Commission Staff so that Qwest can share information with the Staff that would otherwise be confidential and proprietary to the individual CLECs.

b. With respect to the reporting of necessary payments, the Special Master recommends that Qwest be permitted to provide CLECs with this information via secure websites. He recommends changing § 13.2 as follows:

Qwest shall deliver the individual monthly report to the Commission and the Office of Consumer Counsel ~~via email~~ by posting the CLEC results to a secure website and posting the aggregate results to the Qwest wholesale website on or before the last business day of each month following the relevant performance period.

c. The Special Master recommends that Qwest be authorized to use wire transfers, as opposed to checks, to make disbursements when so directed by the Commission.

2. Decision

a. We accept the Special Master's recommendation in concept, but change the language in §§ 12.2 and 13.2 to align more clearly with the Commission's filing requirements and to allow for more protection to the CLECs in the disbursement of payments.

3. Discussion (*Qwest SGAT § 13.2 at 11 and § 12.2 at 11. Joint Comments at 11-15.*)

a. Qwest's proposed language for § 13.2 allows for the posting of the CLEC-specific results to a secure website and of the aggregate results to the Qwest Wholesale Website, as recommended by the Special Master.

b. The Joint CLECs propose additional language that includes a recitation of part of our rule on confidentiality, 4 CCR 723-16. We do not believe this citation is necessary for the CPAP. The reports shall be filed and treated in accordance with the Commission's procedures concerning confidential and proprietary data unless an individual CLEC agrees in writing, filed with the Commission, that reports concerning it are not confidential. No further protection, beyond that already provided by Commission rule, is necessary.

c. Section 13.2 will be changed to state that Qwest is required to file with the Commission "one hard copy and one electronic copy in an Excel format of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file." This will afford Staff of the Commission, the Independent Monitor, and the Auditor access to the report data in a format that can be used for further analysis. The

Commission will establish a docket in which all CPAP-related filings will be made (see § 13.2 in Attachments A and B).

d. As recommended by the Special Master, § 12.2 should allow Qwest the opportunity to make cash disbursements to CLECs and the Special Fund through the means of electronic transfers. We agree with this option, and require additional language be included in this section to give the CLECs some protection from potential discriminatory treatment. The pertinent part of § 12.2 should read as follows:

However, once Qwest and CLEC agree on a method of payment (*i.e.*, wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC.

(See § 12.2 in Attachments A and B).

G. Legal Operation Of The CPAP

1. Supplemental Report and Recommendation (SR&R at 11)

a. The Special Master recommends that § 16.6 be changed to state that Tier 1X "and Tier 1Y" payments to a CLEC are in the nature of liquidated damages. As now written, there is no mention of Tier 1Y payments. The Special Master also recommends that § 16.7 be clarified to state that only the relevant finder-of-fact can judge what amount, if any, of payments under the CPAP should be offset from any judgment in favor of a CLEC in a related action.

2. Decision

a. We accept the Special Master's recommendation. We adopt Qwest's proposed language for § 16.6. We adopt the Joint CLECs' proposed language for § 16.7.

3. Discussion (*Qwest Comments at 10-11. Joint Comments at 15.*)

a. Qwest agrees with the recommendation and proposes language to specify Tier 1Y payments in § 16.6. Qwest notes that § 16.6, which is expressly directed to the mechanism for seeking approval for CLEC recovery of contractual damages, contains a requirement to offset payments to CLECs. Qwest further notes that § 16.7 refers to a different offset. According to Qwest, this is intended to address non-contractual recovery by the CLEC for the same harm for which it received payments under the CPAP. Qwest has proposed language be added to § 16.7 as follows:

With respect to contractual damages sought pursuant to Section 16.6, CLEC must offset any award with any payments made under this CPAP.

b. The Joint CLECs contend the language they propose for §§ 16.6 and 16.7 captures the intent of the Special Master.

c. We conclude that Qwest's proposed language for § 16.6 captures the Special Master's recommendation and is satisfactory. The language proposed by Qwest for § 16.7,

however, is in consistent with the Special Master's recommendation. The Joint CLECs' language for § 16.7 is acceptable because it captures the Special Master's recommendation.

H. Addition Of New Measures For EELS

1. Supplemental Report and Recommendation (SR&R at 10)

a. The Special Master recommends that the CPAP be revised in the near future to include obligations related to Enhanced Extended Loop (EEL). Specifically, the following submeasures, for which Qwest currently is measuring and reporting EELs, should be added to the CPAP: PIDs OP-3, OP-4, OP-5, OP-6, OP-15, MR-5, MR-6, MR-7, and MR-8. He further recommends that Qwest should also be required to include submeasures for pre-order activities for EELs by measuring and reporting EELs for PIDs PO-5 and PO-9, unless Qwest provides a compelling reason not to do so. The EEL submeasures should be included as Tier 1A. The statistical methodology that contemplated for loops in Sections 4 and 5 could be used for EEL submeasures until a set of variance factors can be developed for the EEL submeasures.

2. Decision

a. We accept the recommendation. Submeasures for EELs should be considered for addition to the CPAP at the

first six-month review. The Commission prefers, to the extent possible, that Qwest develop variance factor tables for the EEL submeasures for consideration at the first six-month review.

3. Discussion (Qwest Comments at 11.)

a. Qwest contends that EEL disaggregation for PID PO-5, Firm Order Confirmations (FOCs) on Time, should be added at the six-month review, because the measurement needs to be developed and a standard needs to be identified. Qwest estimates the development work will take three to four months. Qwest commits to beginning the development process with a goal of producing data for use at the six-month review.

b. Qwest argues that EEL disaggregation for PID PO-9, Timely Jeopardy Notices, should not be added. Qwest asserts that the two-way communication (between a CLEC and Qwest) associated with the provisioning of such designed services takes the place of the jeopardy notice.

c. The Commission acknowledges and approves of Qwest's willingness to undertake development to disaggregate PID PO-5 for EELs and to begin producing data to be considered at the first six-month review. We accept Qwest's reasoning for not disaggregating PID PO-9 for EELs and shall not require this disaggregation at this time.

I. Other

1. Qwest Request to Address Possibility of Federal Wholesale Service Quality Rules (Qwest Comments at 11-12)

a. As framed by Qwest, the issue is whether the CPAP needs to recognize, and to take into account, the FCC's wholesale service quality rules and remedies to avoid Qwest's having to pay both CPAP payments and remedies under federal rules.

2. Decision

a. The Commission denies Qwest's proposal to add language to the CPAP to account for federal wholesale service quality rules because no such rules have been promulgated by the FCC.

3. Discussion (Qwest Comments at 11-12. Qwest SGAT § 16.4 at 17-18.)

a. This issue was not addressed in the Special Master's Supplemental Report. Qwest raised this issue for the first time in its comments on the Supplemental Report. Qwest proposed language to be added to § 16.4, which, it asserts, prevents Qwest from having to pay both CPAP payments and remedies under federal rules.

b. The Commission agrees that, as a theoretical matter, the CPAP should recognize, and take into account, federal wholesale service quality rules to avoid Qwest's paying

twice for the same performance. This would treat state wholesale service quality rules and federal service quality rules in a similar manner. However, the FCC has not yet promulgated any federal wholesale service quality rules. Thus, Qwest's proposal is premature. When and if the FCC promulgates federal service quality rules, the Commission can consider whether or not to amend the pertinent sections of the CPAP.

J. Acceptance Of The CPAP

1. Qwest shall file, within seven calendar days of the mailed date of this Order, a statement verified by the Senior Vice President of Policy, or a corporate officer of similar or higher rank having authority to make the verification, indicating either acceptance or non-acceptance of the Colorado Performance Assurance Plan contained in this decision and its Attachments and approved by the Commission. The Qwest verified statement shall state clearly and unambiguously whether Qwest accepts the CPAP contained in this decision and its attachment. If the verified statement is not clear and unambiguous, the Commission will assume that Qwest does not accept the Commission-approved CPAP and will recommend to the Federal Communications Commission that Qwest has not complied with the public interest requirements of § 271.

2. The Commission finds that this clear statement is necessary to have Qwest's acceptance or non-acceptance on record

as soon as possible. If Qwest does not accept the CPAP contained in this decision and its Attachments, the Commission will consider what additional proceedings, if any, are necessary with respect to the Commission's investigation into Qwest's compliance with § 271. As the hearing commissioner and the entire Commission has made abundantly clear, Qwest acceptance of this Commission-approved CPAP is the *sine qua non* of a favorable Commission recommendation to the FCC. There will be no additional changes to the CPAP (other than to correct typographical errors and to make nonmaterial clarifying changes). Therefore, Qwest's failure to accept the Commission-approved CPAP may well result in no further Commission proceedings, or in substantially changed Commission proceedings, before the Commission makes its recommendation to the FCC.

V. ORDER

A. It Is Ordered That:

1. Before receiving a favorable recommendation of § 271 compliance, Qwest will implement the CPAP consistent with this Order and Attachment A, including Appendices A and B, hereto. Attachment A contains the actual SGAT language that must be adopted by Qwest and implemented as the CPAP for this Commission favorably to recommend § 271 compliance. The recommended SGAT language in Attachment A reflects decisions

from the original CPAP Orders, as well as any modifications ordered here. Attachment B reflects the changes, in redline, made to Attachment A of Decision No. R01-1142-I.

2. Qwest shall file, within seven calendar days of the mailed date of this Order, a statement verified by the Senior Vice President of Policy, or a corporate officer of similar or higher rank having authority to make the verification, indicating either acceptance or non-acceptance of the Colorado Performance Assurance Plan contained in this decision and its Attachments and approved by the Commission. The Qwest verified statement shall state clearly and unambiguously whether Qwest accepts the CPAP contained in this decision and its attachments.

3. Time Warner filed an objection to the decision of the hearing commissioner remanding the four specific areas of the CPAP to the Special Master. That motion is denied as moot.

4. *Sua Sponte*, we will strike the phrase in § 13.1 that reads "Beginning 60 days after the Commission's adoption of this CPAP," as extraneous. Qwest has provided mock reports since December, 2001 and is required to continue to do so as ordered in R01-1142-I. These reports should now incorporate the decisions in this order as applicable. Once Qwest receives § 271 approval from the FCC for Colorado, actual payments to the CLECs and the Special Fund shall begin.

5. *Sua Sponte*, we have made other clarification and typographical changes throughout the CPAP language attached to this decision as Attachments A and B. These are non-substantive changes.

6. This Order is effective immediately on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
March 27, 2002.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

EXHIBIT E

COLORADO PERFORMANCE ASSURANCE PLAN RECOMMENDED SGAT LANGUAGE

1.0 Introduction

1.1 As set forth in this Agreement, Qwest and CLEC voluntarily agree to the terms of the following Colorado Performance Assurance Plan ("CPAP" or "Plan"), prepared in conjunction with Qwest's application for approval under Section 271 of the Telecommunications Act of 1996 (the "Act") to offer in-region, interLATA service.

2.0 Plan Structure

2.1 The CPAP is a tiered remedy plan. Qwest shall be subject to self-executing payments to CLEC for Tier 1 submeasures, identified in Appendix A, which generate both Tier 1X and 50% of Tier 1Y payments (described in Sections 7.0 and 8.0). Qwest shall be subject to self-executing payments to the Tier 2 Special Fund for the following: (1) Tier 2 submeasures (identified in Appendix A), (2) Tier 1Y payments not owed to the CLEC (described in Section 8.3), and (3) payments for missing Tier 1A or Tier 1B submeasures by more than 50% (described in Section 10.3).

3.0 Performance Measurements

3.1 The performance standards for each measure and submeasure are identified in Appendix A. This Appendix A places the Performance Indicator Definitions ("PIDs") in Tier 1A, Tier 1B, Tier 1C or Tier 2.

4.0 Statistical Methodology

4.1 Qwest will be in conformance with Tier 1A, Tier 1B, Tier 1C and Tier 2 benchmark submeasures when the monthly performance result equals or exceeds the benchmark, if a higher value means better performance, and when the monthly performance result equals or is less than the benchmark, if a lower value means better performance.

4.2 For Tier 1B and Tier 1C parity submeasures, Qwest uses a statistical test, namely the "Modified z-test," for evaluating the difference between two means (*i.e.*, Qwest and CLEC service or repair intervals) or two percentages (*e.g.*, Qwest and CLEC proportions) to determine whether a parity condition exists between the results for Qwest and CLEC. For the purpose of this Section, the Qwest results will be the Qwest monthly retail results as specified in the PIDs filed with the CPAP as approved by the Colorado Public Utilities Commission ("Commission"). The modified z-test shall be applicable if the CLEC sample size is greater than or equal to 30 for a given submeasure. For testing submeasures for which the sample size is less than 30,

Qwest will use a permutation test to determine the statistical significance of the difference between Qwest and CLEC results.

The formula for determining parity using the z-test is:

$$z = \text{DIFF} / \sigma_{\text{DIFF}}$$

Where:

$$\text{DIFF} = M_{\text{Qwest}} - M_{\text{CLEC}}$$

M_{QWEST} = Qwest average or proportion

M_{CLEC} = CLEC average or proportion

$$\sigma_{\text{DIFF}} = \text{square root } [\sigma^2_{\text{Qwest}} (1/n_{\text{CLEC}} + 1/n_{\text{Qwest}})]$$

σ^2_{Qwest} = Calculated variance for Qwest

n_{Qwest} = number of observations or samples used in Qwest submeasure

n_{CLEC} = number of observations or samples used in CLEC submeasure

In calculating the difference between Qwest and CLEC performance, the above formula applies when a larger Qwest value indicates a better level of performance. In cases where a smaller Qwest value indicates a higher level of performance, the order is reversed, i.e., $M_{\text{CLEC}} - M_{\text{QWEST}}$.

4.3 For parity submeasures where the number of data points is less than 30, Qwest will apply a permutation test to test for statistical significance. Permutation analysis will be applied to calculate the z statistic using the following logic:

Calculate the z statistic for the actual arrangement of the data

Pool and mix the CLEC and Qwest data sets

Perform the following 1000 times:

Randomly subdivide the pooled data sets into two pools, one the same size as the original CLEC data set (n_{CLEC}) and one reflecting the remaining data points, which is equal to the size of the original Qwest data set or n_{QWEST} .

Compute and store the z-test score (Z_s) for this sample.

Count the number of times the z statistic for a permutation of the randomly subdivided data is greater than the actual z statistic.

Compute the fraction of permutations for which the statistic for the rearranged data is greater than the statistic for the actual samples.

If the fraction is greater than α (alpha), the significance level of the test, the hypothesis of no difference is not rejected, and the test is passed. Alpha = 0.05. For

individual month testing for performance measurements involving LIS trunks and DS-1 and DS-3 that are Unbundled Dedicated Interoffice Transport, Resale, or Unbundled Loops (performance measurements: OP-3D/E, OP-4D/E, OP-5, OP-6-4/5, MR-5A/B, MR-7D/E, and MR-8) with sample sizes of 1-10, $\alpha = 0.15$. When performance submeasures disaggregate to zone 1 and zone 2, the CLEC volumes in both zones shall be combined for purposes of statistical testing.

5.0 Critical Z-Value

5.1 The following table shall be used to determine the Critical z-value for Tier 1B and Tier 1C parity submeasures when the CLEC sample size is greater than or equal to 30. It is based on the monthly business volume of the CLEC for the particular performance submeasures for which statistical testing is being performed.

TABLE 1: CRITICAL Z-VALUE

CLEC volume (Sample size)	Critical Z-Value
30-150	1.645
151-300	2.0
301-600	2.7
601-3000	3.7
3001 and above	4.3

5.2 When the CLEC sample size is greater than or equal to 30, Qwest's performance to a CLEC for a Tier 1B or Tier 1C parity submeasure will be considered conforming in a month when the z-score calculated pursuant to Section 4.2 is equal to or less than the appropriate critical z-value identified in Section 5.1, Table 1.

6.0 Tier 1A Parity Calculations

6.1 For Tier 1A, which includes the measures that are most critical and most likely to be relied on most heavily by smaller competitors, the average performance Qwest gives CLEC in the current month shall be compared to the average of prior six months retail performance, subject to a variance factor (standard performance). The average retail performance over the prior six months shall be calculated by summing the six individual monthly numerator values and dividing that amount by the sum of the six individual monthly denominator values. The variance factor shall modify that standard average according to the variance table listed below in Table 2. This table captures the variability of the data and seeks to minimize the impact of smaller sample sizes on the ultimate calculation.

TABLE 2: VARIANCE FACTORS

CLEC volumes	OP-3 LIS	OP-3 UBL¹	OP-4 LIS	OP-4 UBL¹	OP-6 LIS	OP-6UBL	OP-5	NP-1⁵
1-5	25	25	18	14	24	28	20	
6-15	18	18	12	10	16	18	12	
16-22	16	14	9	8	15	15	10	
23-30	15	13	8	7	14	14	9	
31-40	13	11	7	7	12	12	8	
41-60	11	9	6	6	10	10	7	
61-90	9	7	5	6	8	8	6	
91-150	5	5	4	5	6	6	5	
151-300	5	4	3	4	4	4	4	
301-500	4	3	2	3	3	3	3	
501-1000	3	2	2	2	2	2	2	
1001-1500	2	1	1	1	1	1	1	
1501-2000	1	0.5	0.5	0.5	0.5	0.5	.5	
2000+	0	0	0	0	0	0	0	
Measure Type	%	%	Days	Days	Days	Days	%	
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	
CLEC volumes	MR5-LIS	MR5-UBL²	MR6-LIS	MR-6-UBL	MR7³	MR-8³	PO-9b	NI-1⁴
1-5	22	28	220	500	28	28	20	0.64
6-15	16	18	180	300	18	18	12	0.64
16-22	15	15	150	220	15	15	10	0.64
23-30	14	14	130	200	14	14	9	0.64
31-40	13	12	110	160	12	12	8	0.64
41-60	11	10	90	150	10	10	7	0.64
61-90	9	8	70	140	8	8	6	0.53
91-150	7	6	60	130	6	6	5	0.42
151-300	5	4	50	120	4	4	4	0.31
301-500	4	3	40	110	3	3	3	0.23
501-1000	3	2	30	100	2	2	2	0.17
1001-1500	2	1	20	50	1	1	1	0.11
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.05
2000+	0	0	0	0	0	0	0	0
Measure Type	%	%	Mins	Mins	%	%	%	%
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	Add
CLEC volumes	OP-5 L/S	OP-6 L/S	MR-3 L/S	MR-6 L/S	MR-7 L/S	MR-11	MR-12	
1-5	22	12	22	500	25	16	600	
6-15	17	6	12	400	18	9	300	
16-22	13	5	9	300	14	7	250	
23-30	11	4	8	250	12	6	200	
31-40	10	3	6	200	10	5	175	
41-60	8	3	5	175	8	4	150	
61-90	7	2	4	150	7	3	125	
91-150	5	2	4	125	5	2	100	

151-300	4	1	3	120	4	2	75
301-500	3	1	2	90	3	1.5	50
501-1000	2	.7	1.5	60	2	1	40
1001-1500	1.5	.6	1	30	1.5	.75	25
1501-2000	1.25	.5	.75	25	1.25	.5	15
2000+	1	.25	.5	20	1	0	0
Measure Type	%	Days	%	Mins	%	%	Mins
Modification	Add	Add	Subtract	Add	Add	Subtract	Add

¹ Except Analog, 2-wire non-loaded, and ADSL qualified loops.

² MR-5 UBL's variance table also applies for MR3-UBL calculations.

³ MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)

⁴ On NI-1, the variance table only applies in instances where the parity comparison applies – *i.e.*, Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurements is the retail analog or a 1% standard, whichever is higher.

⁵ The first failure will not result in any penalty. Each subsequent failure will constitute a "miss" for purposes of triggering a payment.

6.2 For any Tier 1A benchmark_performance submeasure where the CLEC volume is 10 or below, Qwest shall be allowed to miss one occurrence before being subject to any payments for non-conforming performance. That is, if CLEC volume is ≤ 10 and the number of occurrences is ≤ 1 there is no payment made. For all Tier 1A parity performance submeasures with sample sizes of 1-30, Qwest shall calculate and report payments based upon both the Table 2 variance factors and the permutation test as set out in Section 4.3. CLEC shall receive the higher of the payment based upon variance factors or the payment based upon permutation testing.

6.3 Qwest's performance to a CLEC for a Tier 1A submeasure will be considered conforming in a month when the CLEC performance result is better than or equal to the Qwest standard performance result as defined in Section 6.1.

6.4 For any Tier 1A measure where variance factors have not been developed or where there are insufficient data to develop such factors, the relevant measures shall rely on the same statistical methodology used for Tier 1B and Tier 1C, as set forth in Sections 4.0 and 5.0 of this Plan, to determine performance results.

7.0 Tier 1X: Calculation of Payments to CLEC for Tier 1A, 1B and 1C Submeasures

7.1 Unless otherwise specified in this Section 7.0 or in Appendix A, payments to CLEC under the CPAP are to be made on a per occurrence basis. The formulas set forth below shall be used to determine the total number of occurrences upon which Qwest is required to make payments to CLEC.

For percentage submeasures, the CPAP uses the following formula:

$$\text{CLEC Occurrences} = \text{Absolute value of (CLEC result - standard)} \\ \text{multiplied by CLEC volume.}$$

For interval submeasures, the CPAP uses the following formula:

$$\text{CLEC Occurrences} = \text{Absolute value of ((CLEC result -} \\ \text{standard)/standard)} \text{ multiplied by CLEC volume.}$$

For the above formulas, for Tier 1A parity submeasures, the standard is the average of the prior six months retail performance adjusted by the relevant variance factor in Section 6.1, Table 2. For Tier 1B and Tier 1C parity submeasures, the standard is the current month retail performance, as adjusted for sample size and variance in accordance with Sections 4 and 5. For Tier 1A, Tier 1B and Tier 1C submeasures with a benchmark, the standard is the benchmark.

7.2 For interval submeasures, the number of occurrences shall not exceed the CLEC volume for the particular submeasure.

7.3 If Qwest fails to meet the applicable standard for Tier 1 submeasures, Qwest shall make a per occurrence payment to CLEC as specified in Table 3 below, unless different payment provisions for the applicable Tier 1 submeasure are set forth in Appendix A.

TABLE 3: PER OCCURRENCE PAYMENT AMOUNTS

Tier 1A	\$ 225.00
Tier 1B	\$ 75.00
Tier 1C	\$ 25.00

7.4 To account for the severity of a missed standard, the base payment shall be multiplied by the factor in Table 4 according to the following formula:

$$\text{Base Payment} = (\text{per occurrence payment}) \times (\text{occurrences}) \\ \text{Total Payment} = (\text{base payment}) \times (\text{severity multiplier})$$

The severity multiplier for each measure is obtained by calculating the difference between the CLEC result and the standard performance for that measure, and then looking up the multiplier on Table 4. For Tier 1A, the standard performance is the average of prior six month retail performance with the variance calculation. For Tier 1B and 1C, the standard performance is the current month retail performance. For PIDs that do not have retail equivalents, the benchmark targets shall be used.

The severity penalty shall be derived from the base payment even where the monthly payment has been increased under the minimum payment rule or the additional penalty for ongoing poor performance.

TABLE 4

For Percentage measures		For Interval Measures	
Between	Multiplier	CLEC Performance*	Multiplier
0-4.99%	1	1 < x < 2	1.1
5%-9.99%	1.1	2 x < 3	1.2
10-14.99%	1.2	3 x < 4	1.3
15-19.99%	1.3	4 x < 5	1.4
20-24.99%	1.4	5 x < 6	1.5
25-29.99%	1.5	6 x < 7	1.6
30-34.99%	1.6	7 x < 8	1.7
35-39.99%	1.7	8 x < 9	1.8
40-44.99%	1.8	9 x < 10	1.9
45-49.99%	1.9	10 x < 11	2.0
50-54.99%	2.0	11 x < 12	2.1
55-59.99%	2.1	12 x < 13	2.2
60-64.99%	2.2	13 x < 14	2.3
65-69.99%	2.3	14 x < 15	2.4
70-74.99%	2.4	15 x < 16	2.5
75-79.99%	2.5	.	.
80-84.99%	2.6	.	.
85-89.99%	2.7	.	.
90-94.99%	2.8	39 x < 40	4.9
95%-100%	2.9	40 or over	5

*calculated in days or hours, depending on measure

7.5 Geographically, all measures should only include Colorado statistics. For purposes of reporting, the data will be displayed in the most granular disaggregation possible and will be rolled up to overviews as appropriate. For purposes of minimum payments, a “measure” shall be the highest level of aggregation, i.e. PO-5, OP-4, MR-4, and so forth. For purposes of severity and duration penalties (Tier 1Y), a “measure” shall be at the most granular level of disaggregation, except where otherwise specified. For purposes of statistical comparison and occurrence calculation, a “measure” shall be at the most granular level of disaggregation, except where otherwise specified. If it turns out that CLECs seem to have data that are spread out over the disaggregated “sub-measures” in such a way that this approach leads to consistently small sample sizes (less than 10 in particular, but less than 30 will be considered), yet there is a way in which the samples could be effectively aggregated to create more meaningful sample sizes, then the Commission will consider aggregation during the six-month review.

8.0 Tier 1Y: Calculation of Payments

8.1 Qwest’s non-conforming performance for Tier 1 submeasures shall be subject to escalating per occurrence payments. For Billing measures in Tier 1C, duration

escalation is subject to a \$5,000 per measure cap in month one, increasing by a maximum of \$5,000 per month to a maximum per measure cap of \$30,000. The duration function does not include the severity factor calculated in Tier 1X when doubling (or tripling, *etc.*) the base payment.

8.2 The second continuous month of non-conforming performance for a particular submeasure will require the total per occurrence payment before severity to be multiplied by two. On the third continuous month, the total per occurrence payment before severity will be multiplied by three. The escalation will proceed along these lines until Qwest's wholesale performance meets the relevant standard. At that point (*i.e.*, on the first month of acceptable performance following non-conforming performance), Qwest's per occurrence payment shall "step down" to the next level. If Qwest's next month's performance does not meet the applicable standard for the same submeasure, the payment will remain at the stepped down level and will then step up again if the non-conforming performance continues the following month. Alternatively, if Qwest's performance for the submeasure continues to conform to the standard, the per occurrence payment will step down each month until it reaches the original per occurrence payment.

8.3 For the first 12 months of escalated payments on a particular submeasure discussed in Section 8.2 above, Tier 1Y payments shall be divided between the CLEC and the Tier 2 Special Fund. Fifty percent (50%) of Tier 1Y payments shall be paid to CLEC, and 50% of Tier 1Y payments shall be paid to the Special Fund, as set forth in Section 10.4. If the escalation payments for a particular submeasure continue for more than 12 months, the escalation payments owed to the CLEC will be fixed at 50% of the 12 month level. This fixed amount will continue until Qwest's satisfactory performance for that submeasure results in Qwest paying at the 11 month level. At that point, the process in Section 8.2 will apply. All amounts in excess of the CLEC payments for month 12 will be paid to the Special Fund.

9.0 Minimum Payments to CLEC

9.1 For smaller CLECs, there is a minimum per measure payment for Tier 1A of \$600 and for Tier 1B of \$300. If the otherwise applicable payment is below this amount, the minimum payment shall apply. If the measure is one which falls into Tier 1A for some products, and Tier 1B for other products, and if any of the violations incurred that month for that measure were in Tier 1A, then the Tier 1A minimum payment shall apply rather than the 1B payment. In any month in which no payment is owed, the minimum payment will not apply.

9.2 For purposes of minimum payments, a smaller CLEC is a CLEC with less than or equal to 100,000 lines in service in Colorado (of whatever type – facilities-based, resale, UNE loops (including shared lines) and so forth). Upon adopting the CPAP and at six month intervals after that, a CLEC must certify to the Commission, with notification to Qwest, that it should be designated as a smaller CLEC in order to benefit from the minimum payment. Any CLEC that does not certify that it is below

the minimum lines in service requirement shall not be eligible for the minimum payment.

10.0 Tier 2 Payments to the Special Fund

10.1 Tier 2 performance submeasures and corresponding base payments are set forth in Appendix A.

10.2 Tier 1Y payments not owed to the CLEC (as described in Section 8.3) shall be considered Tier 2 payments, and shall be paid to the Tier 2 Special Fund.

10.3 When an individual submeasure in either Tier 1A or Tier 1B, using CLEC aggregate results, is missed by at least 50% of the applicable standard for two or more consecutive months, Qwest shall pay to the Tier 2 Special Fund \$25,000 for each Tier 1A submeasure missed and \$8,000 for each Tier 1B submeasure missed. A Tier 1A miss shall be determined with CLEC aggregate results by comparing the method identified in Section 6.1 using the variance factors in Table 2 and the variance factors in Table 5 below.

TABLE 5: VARIANCE FACTORS (WITH ONE FREE MISS RULE)

CLEC volumes	OP-3 LIS	OP-3 UBL ¹	OP-4 LIS	OP-4 UBL ¹	OP-6 LIS	OP-6UBL		
1-5	21	18	15	10	20	20		
6-15	17	15.5	11	8.5	16	16		
16-22	16	14	9	8	15	15		
23-30	15	13	8	7	14	14		
31-40	13	11	7	7	12	12		
41-60	11	9	6	6	10	10		
61-90	9	7	5	6	8	8		
91-150	5	5	4	5	6	6		
151-300	5	4	3	4	4	4		
301-500	4	3	2	3	3	3		
501-1000	3	2	2	2	2	2		
1001-1500	2	1	1	1	1	1		
1501-2000	1	0.5	0.5	0.5	0.5	0.5		
2000+	0	0	0	0	0	0		
Measure Type	%	%	Days	Days	Days	Days		
Modification	Subtract	Subtract	Add	Add	Add	Add		
CLEC volumes	MR5-LIS	MR5-UBL ²	MR6-LIS	MR6-UBL	MR7 ³	MR-8 ³	PO-9b	NI-1 ⁴
1-5	18	20	180	300	20	20	14	<u>0.64</u>
6-15	16	16	180	240	16	16	12	<u>0.64</u>
16-22	15	15	150	220	15	15	10	0.64
23-30	14	14	130	200	14	14	9	0.64
31-40	13	12	110	160	12	12	8	0.64
41-60	11	10	90	150	10	10	7	0.64

61-90	9	8	70	140	8	8	6	0.53
91-150	7	6	60	130	6	6	5	0.42
151-300	5	4	50	120	4	4	4	0.31
301-500	4	3	40	110	3	3	3	0.23
501-1000	3	2	30	100	2	2	2	0.17
1001-1500	2	1	20	50	1	1	1	0.11
1501-2000	1	0.5	10	25	0.5	0.5	0.5	0.05
2000+	0	0	0	0	0	0	0	0
Measure Type	%	%	Mins	Mins	%	%	%	%
Modification	Subtract	Subtract	Add	Add	Add	Add	Subtract	Add

¹ Except Analog, 2-wire non-loaded, and ADSL qualified loops.

² MR-5 UBL's variance table also applies for MR3-UBL calculations.

³ MR-7 & 8's column applies both for LIS trunks and Unbundled Loops (UBL)

⁴ On NI-1, the variance table only applies in instances where the parity comparison applies – *i.e.*, Qwest's blocking rates exceed 1%, as the appropriate comparison for that measurement is the retail analog or a 1% standard, whichever is higher.

When the variance factors in Table 5 are used, for any performance submeasure where the CLEC volume is ten or below, a performance submeasure will not be considered missed for the purposes of Section 10.3 until the number of payment occurrences is >1 (the one free miss rule). If the method of determining conformance in Section 6.1 using the variance factors in Table 2 or the variance factors in Table 5 with the one free miss rule results in a conclusion of conformance, then for the purposes of Section 10.3, the performance measurement is considered met. If both methods described in this Section result in a performance measurement miss, Qwest's payment obligation, if any, in this Section shall be the lesser of the payment amounts determined using the two methods.

10.4 All Tier 2 payments (including Tier 1Y payments not owed to the CLEC, as set forth in Section 8.3), any special payments assessed by the Monitor, and the 50% share of payments for inaccurate reporting not self-corrected by Qwest) shall be paid into a Special Fund that Qwest shall keep in an interest-accruing bank account ("Tier 2 Special Fund" or "Special Fund").

10.5 This Special Fund shall pay for the Independent Monitor at least until the first three-year review. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the necessary funds.

10.6 Other potential uses for this fund include: paying a technical advisor for the Commission's CPAP Revision process; paying a consultant for the three-year review; and, if the Commission so decides, paying for additional audits of Qwest's performance measurement and reporting, and paying other administrative expenses.

10.7 Upon implementation of the CPAP, the Commission shall decide how to use the remainder of this fund. The uses shall be competitively neutral efforts in the telecommunications field that do not benefit Qwest directly.

11.0 Cap on Tier 1 and Tier 2 Payments

11.1 There shall be an annual cap of \$100 million on payments for performance under the CPAP. The cap shall apply to Tier 1X, Tier 1Y, and Tier 2 payments as explained in Section 11.3.

11.2 The following shall not count toward the annual cap: any penalties imposed by the Independent Monitor to maintain the integrity of the CPAP; any penalties imposed by the Commission; any penalties imposed directly by the CPAP for failure to report, failure to report timely, or failure to report accurately; any liquidated damages under another Interconnection Agreement; any interest payments; and any damages in an associated action.

11.3 Tier 1Y and Tier 2 penalties shall be subject to a monthly cap of 1/12 of the annual cap of \$100 million. Following is a description of how the monthly cap shall work:

If the total payments (Tier 1X, 1Y, 2) do not exceed the monthly cap, Qwest shall make all payments.

If the total payments (Tier 1X, 1Y, 2) do exceed the monthly cap, Qwest shall pay all Tier 1X payments (even if they alone exceed the monthly cap). Other than Tier 1X and payments specified in Section 11.2, Qwest shall not make payments in excess of the monthly cap. The balance in excess of the monthly cap shall roll forward and be paid when Qwest's total monthly penalties are below the monthly cap, whenever that occurs (even if that should take longer than a year).

In a month in which Qwest's total payment is below the monthly cap, any deferred payments plus interest will be due, but only to the extent that the deferred payments do not cause the total monthly payment to exceed the monthly cap. In the event all Tier 1Y and Tier 2 payments cannot be made in any month due to the monthly cap, Qwest will pay Tier 1Y payments first (up to the monthly cap) and then, from the remaining money, pay Tier 2 payments (up to the monthly cap).

The deferred payments shall be paid with interest on the relevant amount. The interest rate shall be equal to twice the Commission prescribed customer deposit rate.

If Qwest wishes to make any Tier 1Y and Tier 2 payments over and above the monthly cap in order to avoid paying interest on the deferred amount, it may do so.

11.4 If Qwest payments equal or exceed the annual cap for two years in a row or equal or exceed 1/3 of the annual cap in a combination of two consecutive months, the Commission shall have the authority to open a proceeding to request Qwest to explain the non-conforming performance and show that it did not result from Qwest's failure to avoid reasonably foreseeable risks. If the Commission concludes that Qwest failed to act in a prudent manner to avoid reasonably foreseeable consequences, the Commission may raise the cap to the amount which Qwest would have paid in the higher of the prior two years, may ask the Federal Communications Commission ("FCC") to halt Qwest's long distance marketing authority for a particular interval, may levy a fine, and/or may take other appropriate action.

12.0 Timing and Form of Payment

12.1 All Tier 1 payments to CLEC and all Tier 2 payments to the Special Fund shall be made on the last business day of the month following the due date of the performance measurement report for the month for which payment is being made.

12.2 All payments shall be in cash. Qwest shall be allowed, after obtaining the individual agreement of CLEC, to make such cash payments through the use of electronic fund transfers to CLEC and the Special Fund. However, once Qwest and CLEC agree on a method of payment (*i.e.*, wire transfer or check), Qwest shall not change the method of payment without the permission of CLEC. Qwest shall be able to offset cash payment to CLEC with a bill credit applied against any non-disputed charges that are more than 90 days past due.

12.3 Qwest shall provide monthly payment information at the same time that the performance reports are due. Monthly payment information shall include the payment calculations.

12.4 In the case of late payments, Qwest shall pay interest to CLEC and to the Special Fund, as applicable, calculated at twice the Commission prescribed customer deposit rate, on the amount in question. Should Qwest demonstrate to the relevant CLEC or to the Independent Monitor that it overpaid, it shall be able to deduct from future payments any past overpayment, along with interest calculated at the Commission prescribed customer deposit rate for the amount in question.

13.0 Reporting

13.1 Qwest will provide the Commission and CLECs opting into the CPAP with a monthly report of Qwest's performance for the PIDs. These reports shall contain any carry-over payment amounts and calculations as well as the current month's information. Qwest will collect, analyze, and report performance data for these PID

measurements. Qwest will store such data in easy-to-access electronic form for three years after they have been produced and for an additional three years in an archived format. Any failure to follow these requirements shall be treated as a violation of the CPAP integrity requirements discussed in Sections 17.5 and 17.8.

13.2 On or before the last business day of each month following the relevant performance period, Qwest shall post the individual CLEC monthly reports to a secure part of the CPAP website and the aggregate state report to the public part of the CPAP website. In addition, Qwest must officially file with the Commission, one hard copy and one electronic copy in an Excel format, of all CLEC individual monthly reports under seal and one hard copy and one electronic copy in an Excel format of the state aggregate report in the public file. If CLEC requests a hard copy of its individual report, Qwest should make that hard copy available at no cost to CLEC.

13.3 In the case of late reporting, Qwest shall make a payment to the Special Fund of \$500 per calendar day for each day the report is late. This amount represents the total payment for missing a reporting deadline, rather than a payment per report and does not count against the cap described in Section 11.1. This payment shall begin on the report due date and continue until the report is actually distributed.

13.4 If any inaccurate reporting is revealed by any annual audit, Commission audit or mini-audit, Qwest shall make any payments due to the CLEC as a result of the inaccurate reporting plus an additional payment of 50% of the amount due as a result of the underpayment. Half of the 50% payment shall be paid into the Tier 2 Special Fund, and half shall be paid to the CLEC.

13.5 In addition to the Section 13.4 payment, if as a result of an inaccurate report, any bill over \$25,000 is adjusted upwards by 25% or more, Qwest shall also incur a late reporting payment as set forth in Section 13.3. This payment shall begin on the report due date and shall continue until the day the discrepancy is resolved.

13.6 If a discrepancy is revealed solely by Qwest, and Qwest self-corrects the discrepancy prior to the monthly payment being due, no additional liability shall be assessed. If Qwest self-corrects the erroneous reports before an audit on the relevant measurements in question begins but after the relevant payment is made, it shall be responsible for paying the additional amount owed due to the non-conforming performance as well as interest on this amount at the rate of two times the Commission prescribed customer deposit rate.

13.7 If a discrepancy is revealed by a Qwest-CLEC data reconciliation process or any other inquiry, Qwest shall pay the additional amount owed as well as interest on any late additional amount at the rate of three times the Commission prescribed customer deposit rate.

13.8 If a Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upwards three months in a row, Qwest must pay the additional amount and

an additional penalty to Tier 1Y as if the discrepancy had been revealed by an audit (see Section 14.12) for that third month and for each consecutive month that the CLEC reveals additional payments via data reconciliation.

13.9 If a Qwest-CLEC data reconciliation process forces Qwest to adjust its payment upward five times in a calendar year, Qwest must pay the additional amount and an additional penalty to Tier 1Y as if the discrepancy had been revealed by an audit for that fifth month and for all other months in that calendar year that the CLEC reveals additional payments via data reconciliation.

14.0 Audits of Performance Results

14.1 Qwest shall carefully document any and all changes that Qwest makes to the Performance Measurement and Reporting System. This change log shall be displayed on a public website dedicated to the CPAP. The Performance Measurement and Reporting System is defined to include at least: elements of Qwest's Regulatory Reporting System that constitute the data collection programs (*i.e.*, the software code used by Qwest to determine which data fields are used and how they are used), the underlying data extracted by the data collection programs and data reference tables (*e.g.*, USOC tables, wire center tables, *etc.*, used in the calculation of measurements), the data staging programs (programming code used to organize and consolidate the data), the calculation programming (the code used to implement the formula defined for a measurement), and the report generation programs (including the report format and report file creation). This change log shall contain, at a minimum, a detailed description of the change (in plain English); the effects of the change, the reason for the change, the dates of notification and of implementation, and whether the change received Commission approval. Qwest shall also record if the change is fundamental or non-fundamental (see Sections 14.2 and 14.3).

14.2 Qwest shall be allowed to change the Performance Measurement And Reporting System as defined in Section 14.1 in ways that are non-fundamental (*i.e.*, system changes for which the relevant performance data can be replicated under the old approach) without preapproval, but shall promptly record these changes on the change log. Omitted or inaccurate changes shall result in Qwest being required to pay a \$2500 fine, plus interest at the Commission prescribed customer deposit rate accrued from the time the change took effect. The payment shall go to the Tier 2 Special Fund and does not count against the annual cap described in Section 11.1.

14.3 Before making any changes to the Performance Measurement and Reporting System in a manner whereby the relevant data cannot be reconstructed under the prior approach (*i.e.*, a fundamental change to its measurement system), Qwest shall record the proposed change to the change log and notify the Auditor retained for the purpose of auditing performance measurements under this CPAP to request an evaluation of the proposed change. The Auditor will evaluate the impact of the proposed change and report, in writing, the results of that evaluation to the

Commission and Qwest. Qwest shall immediately post the Auditor's report on the public CPAP website. Upon receiving the report of the impact evaluation from the Auditor, the Commission shall have 15 days to take action to prevent Qwest from making such change and to decide on a process for resolving the issue. During the first seven day period following the filing and recording of the Auditor's report, interested parties may file comments on the proposed change and Auditor's report. If the Commission takes no action on the issue during the 15 day period, Qwest shall be free to make the proposed change.

If Qwest makes a fundamental change pursuant to this Section without obtaining approval, it shall be liable for \$100,000 payable to the Special Fund. If Qwest cannot reproduce reliable performance data, the Independent Monitor shall determine what payments are due based upon the data collected by the affected CLECs along with any appropriate interest and late payment penalties.

14.4 Qwest shall keep a record of all exclusions (*i.e.*, those allowed by the PIDs, authorized by the Commission or otherwise excluded for any reason) and of each basis for each exclusion. Such records shall be kept in easy-to-access electronic format for three years and an additional three years in an archived format.

14.5 As part of the data reconciliation process, CLEC shall have the right to request access to the raw, excluded data and business rules or other basis relied upon by Qwest to exclude the data from the most recent month's report. The records and data must be turned over, in a mutually-agreeable format within two weeks of the request.

14.6 An independent audit of the results of the performance submeasures identified in Appendix A and the financial payments calculated based upon Qwest's performance results shall be performed annually. The first audit shall begin one year after the effective date the CPAP, and the second and third annual audits shall begin one year after the completion of the prior year's audit. Qwest shall pay for the first three audits; thereafter, the Commission shall determine whether the audits shall be paid by the Special Fund or by Qwest. The annual audit shall encompass both the performance reports and payment amounts. The audit shall include at least the following: (1) problem areas requiring further oversight as identified in the previous audit(s); (2) any submeasures changed or being changed from a manual to electronic system; (3) the accuracy of the measurements and reports designated in Tier 1A; (4) submeasures responsible for 80% of the payments paid by Qwest over the prior year (to the extent that they are not covered by the Tier 1A audit); and (5) whether Qwest is exercising a proper duty of care in evaluating which, if any, performance results can be properly excluded from its wholesale performance requirements.

14.7 A thorough scrutiny of Qwest's measurement and reporting system shall not be required for the annual audit. If, after examining the structure of the performance and measurement system, receiving input from CLECs, examining exclusions made by Qwest, and evaluating the nature of any changes, as well as some representative

examples, the Auditor can confidently conclude that the measurement and reporting system is reliable, the Auditor need not perform a more extensive audit.

14.8 The Auditor shall be chosen by the Commission, with input from Qwest, CLECs, and other interested persons. The Auditor shall perform all of the auditing functions described above for the first three years. Any interested person may petition the Independent Monitor to disqualify the Auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Auditor shall respond to the petition within a reasonable time. The Independent Monitor shall then be authorized, in its discretion, to open a proceeding to consider the petition for disqualification.

14.9 CLEC may request a mini-audit of the performance measurement results covering Qwest's performance to CLEC for any submeasures. However, a CLEC will not be allowed to commence such an audit unless and until (1) CLEC has requested access to the raw data and business rules and attempted to meet with Qwest to attempt data reconciliation for any discrepancies by presenting its own version of the data calculation and comparing it to Qwest's to demonstrate the areas in which Qwest allegedly erred, and (2) Qwest and CLEC are unable to reach agreement about any alleged discrepancy through the Qwest-CLEC data reconciliation process. Qwest must provide the necessary expertise and work in good faith to attempt to answer CLEC concerns. Qwest's experts must be available for requested meetings to take place within 10 business days of the CLEC request, but Qwest may attempt to resolve the issue over the phone or via email before holding a face-to-face meeting.

14.10 Upon CLEC request, data files of the CLEC raw data, or any subset thereof, and business rules or other basis used to generate the reports as part of the data reconciliation process will be transmitted, without charge, to CLEC, within two weeks of the request, in a mutually acceptable format, protocol, and transmission medium.

14.11 The scope of the mini-audit allowed under this CPAP is limited to the relevant measures and submeasures that were the subject of and determined to be suspect, through the Qwest-CLEC data reconciliation process.

14.12 The mini-audit shall be conducted by the Auditor designated for annual audits, unless CLEC demonstrates to the Independent Monitor good cause that another entity should perform the mini-audit. CLEC shall pay the Auditor's fees and expenses, and CLEC and Qwest shall bear their own costs. If a mini-audit identifies a non-conformance that materially affects the results (material being defined as a deficiency that requires an additional payment of at least 10% more than the total amount paid on the submeasures examined by the mini-audit) by Qwest, Qwest shall pay the Auditor's fees and expenses. In addition, Qwest shall resolve the identified problems and shall pay any applicable payments under the late payment provisions. Qwest shall also pay other CLECs any appropriate payments and penalties based on problems uncovered in the mini-audit. If the Auditor does not identify any non-conformance, CLEC shall not be allowed to request another mini-audit during the six

months after the initial mini-audit request; however, CLEC is nevertheless permitted to request Qwest-CLEC data reconciliation during that time.

14.13 If CLEC proves to the Independent Monitor via the dispute resolution process that Qwest did not work in good faith to resolve the issues prior to the initiation of a mini-audit, the Independent Monitor can shift the Auditor's fees and expenses to Qwest, and the six-month moratorium on mini-audits shall then be waived.

14.14 The Commission reserves the right to choose to conduct an audit itself, with the assistance of an outside Auditor if it chooses. Such an audit shall be paid for through the Special Fund. If the audit reveals any material non-conformance (as defined above) in Qwest's performance reporting, Qwest shall reimburse the costs of the audit and, where appropriate, shall make applicable payments to CLECs or Special Fund as described above.

15.0 Waiver of Payments

15.1 Qwest may seek a waiver of the obligation to make payments pursuant to this CPAP by seeking an exception from the Independent Monitor on any of the following grounds:

- (1) *Force majeure*, as defined in SGAT Section 5.7 (as to benchmark standards, but not as to parity submeasures);
- (2) A work stoppage (as to benchmark standards, but not as to parity submeasures);
- (3) An act or omission by CLEC that is in bad faith and designed to "game" the payment process; or
- (4) A material failure by CLEC to follow the applicable business rules.

15.2 Any waiver request must contain an explanation of the circumstances that justify the waiver, and any and all relevant documentation relied upon to support the request. To establish that the circumstances warrant granting of a requested waiver, Qwest must show the existence of those circumstances by a preponderance of the evidence. For any such action, Qwest shall be required to pay the disputed credits or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. CLEC must respond to any such waiver requests within 10 business days and the Independent Monitor shall have 10 business days after the response is filed to rule on the requested waiver, subject to review by the Commission as specified by the Dispute Resolution Process in Section 17.0.

16.0 Limitations

16.1 The payments imposed by the CPAP shall not become available in Colorado until the first day of the second month after Qwest receives Section 271 authority for the State of Colorado. Each CLEC shall have the option of electing the CPAP *in toto* as set forth in this CPAP SGAT or of negotiating an alternative regime with Qwest. The CLECs need not adopt the *Interconnection, Unbundled Network Elements, Ancillary Services, and Resale SGAT* in its entirety in order to adopt the CPAP SGAT. Qwest will not be liable for Tier 1 payments to CLEC until the Commission has approved an interconnection agreement between the CLEC and Qwest which adopts the provisions of this CPAP.

16.2 Qwest's agreement to implement these enforcement terms, and specifically its agreement to make any payments hereunder, will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating in whole or in part to the same performance. CLEC may not use (1) the existence of this enforcement plan or (2) Qwest's Tier 1 or Tier 2 payments as evidence that Qwest has discriminated in the provision of any facilities or services under Sections 251 or 252 of the Act or has violated any state or federal law or regulation. Qwest's conduct underlying its performance measures, however, is not made inadmissible by this SGAT term. By accepting this performance remedy plan, CLEC agrees that Qwest's performance with respect to this remedy plan may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation. (Nothing herein is intended to preclude Qwest from introducing evidence of any Tier 1 payments under these provisions for the purpose of precluding additional payments or offsetting any payments against any other damages or payments a CLEC might recover.) The terms of this paragraph do not apply to any proceeding before the Commission or the FCC to determine whether Qwest has met, or continues to meet, the requirements of Section 271 of the Act.

16.3 This CPAP contains a comprehensive set of performance submeasures, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the CPAP, CLEC must adopt the CPAP in its entirety, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 16.4, 16.6, and 16.7.

16.4 In electing the CPAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules (in that regard, this CPAP shall constitute an "agreement of the parties" to opt out of those rules, as specified in 4 CCR 723-43-10 of those rules) or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the CPAP. The CPAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

16.5 Whether or not a CLEC opts into the CPAP, Qwest shall be responsible for making payments to the Tier 2 Special Fund including Tier 1Y payments not owed to the CLEC, as set forth in Section 8.3, for the wholesale performance provided to that CLEC.

16.6 Tier 1X and Tier 1Y payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the CPAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 17.0 to proceed with the action. This permission shall be granted only if CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for non-conforming performance in the relevant area do not redress the extent of the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this CPAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the CPAP, no such procedural requirement shall apply.

16.7 If for any reason CLEC agreeing to this CPAP is awarded compensation for the same harm for which it received payments under the CPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm. Only that relevant finder of fact, and not Qwest in its discretion, can judge what amount, if any, of CPAP payments should be offset from any judgment for a CLEC in a related action.

16.8 If Qwest believes that some Tier 2 payments duplicate payments that are made to the state under other service quality rules, Qwest may make the payments to a special interest bearing escrow account and then dispute the payments via the Independent Monitor. If Qwest can show that the payments are indeed duplicative, it may retain the money (and its interest) that are found to duplicate other state payments. Otherwise the money will go to the Tier 2 Special Fund.

16.9 The Commission shall have the right to modify this plan at any time as appropriate.

17.0 Dispute Resolution Process

17.1 The dispute resolution process specified in this CPAP does not replace or in any way limit, among other things, the processes for resolving interconnection disputes not within the ambit of the CPAP.

17.2 The Commission shall appoint an Independent Monitor to resolve disputes identified in Section 17.5. The salary and expenses of the Independent Monitor shall be paid by the Special Fund. If at any time, the Special Fund does not contain sufficient funds to pay for the Independent Monitor, Qwest shall advance the funds until the Special Fund contains the necessary funds to cover these expenses.

17.3 In the event that any person determines that the Independent Monitor has acted with gross neglect of duties, committed any ethical impropriety, has a significant conflict of interest, or is incompetent to perform the assigned task, the person may contact the Chief Administrative Law Judge (ALJ) of the Commission. The Chief ALJ shall be authorized in its sole discretion to file a petition, to remove the Independent Monitor. The Commission shall rule on the petition within two months, including any hearing that it may hold to resolve disputed facts.

17.4 If the Independent Monitor position is vacant at any time, the parties shall file requests for dispute resolution with the Chief ALJ, who shall then be responsible for fulfilling the duties of the Independent Monitor or designating another ALJ to do so. If the Commission decides during the CPAP Revision Process that it wishes to assign some or all of the Independent Monitor's duties to either the Commission ALJs or to Commission staff persons, it shall be free to do so and the contract with the Independent Monitor shall so provide.

17.5 The Independent Monitor shall be responsible, at least initially, for the following functions, which may be modified by the Commission as it deems appropriate, with input from the parties, and for other responsibilities as set out in the CPAP (see, for example, Section 17.12). The Independent Monitor shall resolve all challenges to the accuracy of any performance measurements or reports, as evaluated through the auditing process in Section 14.0, as well as any disputes over the CPAP integrity requirements (that is, the rules that enable the CPAP to function, such as data collection and retention requirements, maintaining the PIDs as approved, and so forth). If Qwest is repeatedly penalized for failing to meet the performance requirements under any given PID, the Independent Monitor shall have the authority to require Qwest to perform a root-cause analysis. The Independent Monitor shall evaluate, including necessary investigation of, all allegations that Qwest has misinterpreted, wrongly applied, or violated the relevant business rules that govern the applicable payments to be made pursuant to the CPAP. For example, for disputes about whether particular CLEC actions qualify as exclusions from a measure, where such disputes were not settled by the Qwest-CLEC data reconciliation process or an audit, the Independent Monitor shall be authorized to decide what payments should have been made. The Independent Monitor shall also entertain challenges to disqualify the Auditor based upon gross neglect of duties, incompetence, or a significant conflict of interest. The Independent Monitor shall approve or deny permission for a CLEC to bring an overlapping lawsuit for contractual remedies. Finally, the Independent Monitor shall assess any additional penalties under this plan, such as penalties for bringing frivolous disputes.

17.6 The dispute resolution process envisioned by the CPAP provides a means of resolving issues raised by the CPAP reports, payment calculations and processes. This process is akin to the dispute resolution processes that might be established in other Interconnection Agreements, except it applies exclusively to the CPAP.

17.7 The Independent Monitor shall employ a slightly modified version of the Commission's expedited dispute resolution procedure set forth in 4 CCR 723-1-61(k), but if the designated Independent Monitor so chooses, it shall be able to submit any desired material procedural changes to the Commission, which shall solicit comments from all interested persons before making a decision whether to adopt the procedural change. The procedural changes may be limited to a particular dispute or may apply to all future disputes as deemed appropriate by the Commission.

17.8 The CPAP's dispute resolution process shall not be resorted to unless and until the problem is raised at the Vice President – Vice President level at least two weeks before a dispute is submitted to the Independent Monitor. As part of its request for dispute resolution, the party making the request ("complainant") must provide a statement including specific facts that the complainant engaged (or attempted to engage) in good faith negotiations to resolve the disagreement, and that, despite these good faith efforts, the parties failed to resolve the issue.

17.9 Insofar as there is a dispute about any business rule or requirement of the CPAP, any ruling issued by the Independent Monitor shall bind all parties unless and until it is reversed or modified by the Commission. If the Independent Monitor's decision is reversed or modified upon review, any payments affected by the Commission's decision must be refunded.

17.10 The Commission's review, while plenary, shall not include consideration of any evidence not presented to the Independent Monitor. Appeals must be filed within five business days of the Independent Monitor's decision, and the opposing party shall have five business days to respond. The Commission shall then have 15 business days to rule on the appeal. A party shall have five business days to seek reconsideration or rehearing and the Commission shall have 10 business days to rule on any such motions. As a term of participation in the CPAP, all decisions after a motion for reconsideration and rehearing are final and shall be appealable to federal court under the standard in the Federal Arbitration Act.

17.11 In all actions before the Independent Monitor, the losing party shall pay all relevant attorney's fees and costs – including monies spent to prove that the problem exists – as determined by the Independent Monitor.

17.12 With regard to requiring payments that were erroneously withheld, the Independent Monitor shall enforce penalties for late payments and inaccurate reporting, as may be applicable. With regard to CPAP integrity requirements, the Independent Monitor shall be able to order the appropriate payments for misreporting along with the 50% premium, and shall be able to levy an additional payment of up to \$100,000 if the Independent Monitor finds that such action materially affected the payments, was willful, and was taken without any legitimate business justification. Any action by CLEC that materially affects the relevant payments, lacks any legitimate business justification, and can be explained solely as an effort willfully to "game" the CPAP shall be grounds for the Independent Monitor's invalidating all

payments received as a result of such actions. In addition, if the Independent Monitor finds it appropriate, CLEC shall be required to pay to Qwest a payment equaling 50% of the amount at issue and shall also be subject to an additional payment amount up to \$100,000. In all actions before the Independent Monitor, the losing party shall pay all relevant attorney fees and costs, including monies spent to prove that the problem exists, as determined by the Independent Monitor.

18.0 Effective Date, Reviews and Termination

18.1 The effective date of the CPAP is the date on which Qwest obtains § 271 approval from the FCC for Colorado. Dates for reviews of the CPAP are calculated from this effective date.

18.2 Reviews of the CPAP occur every six months, commencing with the effective date of the CPAP. Under the six-month CPAP review process, a Commission staff person shall submit a report to the Commission at the five month mark to recommend a series of changes, if any, to the CPAP, noting which of those were agreed to by all parties and which were contested.

18.3 In order to prepare this six-month review report, the relevant Commission staff person (along with any technical advisor the Commission may choose to retain and pay from the Tier 2 Special Fund) shall request feedback on possible changes and shall meet with parties (individually or together) and the Independent Monitor beginning no later than 90 days into the relevant cycle.

18.4 After the Commission staff person submits a six-month review report to the Commission on any suggested changes, parties shall have two weeks to file exceptions to, or comment on, that report. The Commission will rule within four weeks of receiving the parties' exceptions and/or comments on what changes, if any, should be instituted.

18.5 The Commission shall conduct a proceeding to resolve any disputed issues.

18.6 The six-month CPAP review process shall focus on refining, shifting the relative weighing of, deleting, and adding new PIDs; however, the six-month review is not limited to these areas. With the exception of the areas specifically identified in Section 18.7 as eligible for review only at the three-year and six-year reviews, any other part of the CPAP is eligible for review during the six-month CPAP review. After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes.

18.6.1 If, pursuant to Section 8.2, a PID continues to trigger a payment escalation for six months or more, that PID shall automatically be reviewed during a six-month review pursuant to this Section, in order to determine if there are issues with that PID,

such as poor definition, that need to be addressed. In order to minimize this likelihood, the sound practice for introducing PIDs is to work through a collaborative forum before bringing a proposed PID addition or change to the Commission. The preferred approach is to introduce new PIDs as diagnostic measures, allowing for some reporting of actual data before determining the relevant standard and appropriate penalties.

18.7 Parties may suggest more fundamental changes to the CPAP; but, unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review. The following areas of the CPAP will be eligible for change only at the three-year and six-year reviews:

- (1) The statistical methodology (Sections 4.0, 5.0 and 6.0) except for additions to the variance tables for new Tier 1A measures;
- (2) The payment caps (Sections 11.0 and 18.8);
- (3) The duration of the CPAP (Section 18.11);
- (4) The payment regime structure (Sections 2.0, 7.0, 8.0, 9.0, 10.1, 10.2, 10.3, and 10.4) except for the addition of payment amounts for new Tier 2 measures and of payment amounts for violations of change management requirements;
- (5) The legal operation of the CPAP (Sections 15.0 and 16.0);
- (6) The Independent Monitor (Section 17.0) with the exception of assignment of the Independent Monitor function to an Administrative Law Judge;
- (7) Any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance.

18.7.1 If, at the conclusion of a six-month CPAP review, the Commission orders a change in any areas identified in Section 18.7 without Qwest's consent, the Commission decision shall be stayed automatically during the course of any judicial challenge up to issuance of a final non-appealable order on the merits. This provision shall not apply if there is no judicial challenge.

18.8 Qwest shall calculate separately, payments owed under the CPAP that do not include changes made at the six-month review ("baseline CPAP") and payments owed under a CPAP revised to reflect changes made at the six-month review ("revised CPAP"). If payments calculated under the revised CPAP are more than 110% of payments calculated under the baseline CPAP, Qwest shall limit payments to the affected CLECs and to the Special Fund to a 10% increase ("10% collar") above the total baseline CPAP payment liability. Any CLEC affected by this limitation of payments shall be eligible for payments above the 10% collar from the Special Fund. If the Special Fund does not contain sufficient funds to provide such payments to CLECs, Qwest shall make up the difference. Any funds that Qwest provides to make up the difference will be offset against Qwest's future Special Fund liabilities. At any six-month review, if the total payment liability for the revised CPAP is below 110% of the total payment liability for the baseline CPAP for the preceding six month period, the revised CPAP shall become the baseline CPAP for the next six month

period, otherwise, the same baseline CPAP shall remain in effect for the next six month period.

18.9 If Qwest or CLEC wishes to modify a PID outside of the six-month review process and before the Three-Year Review set forth in the CPAP, the change must be approved by the Independent Monitor and then also approved by the Commission.

18.10 Thirty (30) months after the effective date of the CPAP, the Commission shall initiate a comprehensive review of the CPAP (the "Three-Year Review") with the assistance of an outside, independent expert. Such expert shall be paid from the Special Fund. When there are insufficient funds in the Special Fund for this purpose, Qwest shall advance the funds. The Three-Year Review shall:

- (1) Seek to refine the payment amounts by developing an evidentiary basis for the harm associated with particular non-conforming wholesale performance and to adjust the CPAP's payment amounts accordingly. Such evidence shall be the only basis for making upward or downward adjustments to the CPAP's payment amounts during the three-year review.
- (2) Evaluate whether there are available economical alternatives to Qwest's wholesale service offerings and whether such alternatives provide competitors with a meaningful opportunity to compete. This process shall thus consider the rationale for removing measures (or submeasures) both based on Qwest's demonstration of its ability to deliver reliable wholesale performance in certain areas and/or the fact that Qwest's critical role in the market as a provider of key wholesale inputs is dissipating to the extent that the Commission can lift performance assurance requirements (either on a measure or submeasure basis).
- (3) Focus on whether some areas -- disaggregated by either product type or geographic area -- no longer need to be measured and/or subject to payments for non-conforming wholesale performance.
- (4) Evaluate whether the revision process should take place at a semi-annual, annual, or other interval.

At the three-year review, the Commission cannot require Qwest, under the authority granted to it under the CPAP, to undertake any new obligations. At the Three-Year Review, if it chooses to do so, the Commission may order changes in the CPAP. The Commission decision shall be effected according to its terms unless stayed by action of the Commission or by action of a court of competent jurisdiction.

18.11 Except as provided in this Section, this CPAP will expire six years from its effective date. Only Tier 1A submeasures and payments will continue beyond six years, and these Tier 1A submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after the CPAP's effective date, a review shall be conducted with the objective of phasing-out the CPAP entirely. This review shall focus on ensuring that phase-out of the CPAP is indeed appropriate at that time, and on identifying any submeasures in addition to the Tier 1A submeasures that should continue as part of the CPAP.

19.0 Voluntary Performance Assurance Plan

19.1 This CPAP represents Qwest's voluntary offer to provide performance assurance.

APPENDIX A

This appendix lists the submeasures to be included within the Performance Assurance Plan, classified either under Tier 1A, Tier 1B, Tier 1C or Tier 2. All submeasures not otherwise so designated rely on, and incorporate by reference, the Performance Indicator Definitions (PIDs) developed and approved by the Regional Oversight Committee's (ROC) Technical Advisory Group (TAG). For Tier 1A submeasures, the average performance Qwest gives a CLEC in the current month shall be compared to the average of prior six months retail performance subject to a "variance factor" (see Section 6.1, Table 2). In areas where this document suggests a standard that is in dispute (both procedurally and substantively) as part of the Commission's Section 271 review (namely, the standards for collocation, TBD1 (premature disconnects), subloops, conditioned loops and line sharing and line splitting), the standard listed herein is meant as a default standard that would give way in the event that the Commission adopts a different one.

TIER 1A

INTERCONNECTION

Trunk Blocking

NI-1A	<i>LIS Trunks to Qwest Tandem Offices (Percent)</i>
NI-1B	<i>LIS Trunks to Qwest End Offices (Percent)</i>

Provisioning

For LIS Trunks:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

Maintenance and Repair

For LIS Trunks:

MR-5A	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-5B	<i>All Troubles Cleared within 4 Hours (Percent)</i>

¹ Submeasures for OP-4 are included with OP-6 as "families" OP-4A with (OP-6A-1 & OP-6B-1 combined); OP-4B with (OP-6A-2 & OP-6B-2 combined); OP-4C with (OP-6A-3 & OP-6B-3 combined); OP-4D with (OP-6A-4 & OP-6B-4 combined); and OP-4E with (OP-6A-5 & OP-6B-5 combined). Submeasures within each family share a single payment opportunity with only the submeasure (OP-4 or OP-6A & OP-6B combined) with the highest payment being paid.

MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

SWITCHING CUSTOMERS

For Unbundled Loops:

OP-13A	Analog	<i>Coordinated Cuts on Time (Percent)</i>
OP-13A	All Other	<i>Coordinated Cuts on Time (Percent)</i>
OP-7		<i>Coordinated Hot Cut Interval (Percent)</i>
OP-8B		<i>Number Portability Timeliness (Hours:Minutes)</i>
OP-8C		<i>Number Portability Timeliness (Hours:Minutes)</i>
NP-1A		<i>NXX Code Activation (Percent)</i>
OP-17		<i>Timeliness of Disconnects associated with LNP Orders (Percent)</i>
MR-11		<i>LNP Trouble Reports Cleared within 24 Hours (Percent)</i>
MR-12		<i>LNP Trouble Reports-Mean Time to Restore (Hours:Minutes)</i>

OP-13A would not be subject to a severity measurement as part of the Tier 1X calculation. Instead, OP-7 (Coordinated Hot Cut – Unbundled Loop), which will be reconfigured to measure the out-of-service time for a coordinated hot cut, which provide the following particularized severity function:

<u>Hrs Out of Service</u>	<u>Payment</u>
1-1.99	\$225
2-2.99	\$450
3-3.99	\$675
4-4.99	\$800
5+	\$1025

COLLOCATION

Collocation is measured on (1) whether the feasibility studies are completed on time (e.g., within 10 days); (2) whether the installation commitment is met; (3) how many days late is particular feasibility study; and (4) how many days is a particular installation of the requested space. The applicable standard for making collocation space available shall be the CLEC's interconnection agreement, the Commission standard, or the FCC regulation, whichever is applicable. For addressing these issues, the relevant calculations and the associated payments shall be:

<u>Days Late for Feasibility Study</u>	<u>Payment</u>	<u>Days Late For Installation</u>	<u>Payment</u>
1-10	\$45	1-10	\$150
11-20	\$90	11-20	\$300
21-30	\$135	21-30	\$450
31-40	\$180	31-40	\$600
40+	\$300	40+	\$1000

ACCESS TO LOCAL LOOPS

Pre-Order

For Unbundled Loops:

PO-5A-1(b)	IMA Electronic LSRs	<i>FOCs On Time (Percent)</i>
PO-5A-2(b)	EDI Electronic LSRs	<i>FOCs On Time (Percent)</i>
PO-5B-1(b)	IMA Electronic/Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-5B-2(b)	EDI Electronic/Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-5C-(b)	Fax Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-9B		<i>Timely Jeopardy Notices (Percent)</i>

Provisioning

For Unbundled Analog Loops:

OP-3A	non-designed	<i>Installation Commitments Met (Percent)</i>
OP-3B	non-designed	<i>Installation Commitments Met (Percent)</i>
OP-3C	non-designed	<i>Installation Commitments Met (Percent)</i>
OP-3D	designed	<i>Installation Commitments Met (Percent)</i>
OP-3E	designed	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	non-designed	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-4B ¹	non-designed	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-4C ¹	non-designed	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-4D ¹	designed	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-4E ¹	designed	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-5		<i>New Service Installation without Trouble Reports (Percent)</i>

For Unbundled Non-Loaded Loops (2-wire):

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Unbundled Non-Loaded Loops (4-wire):

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Unbundled DS1-Capable Loops:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Unbundled ISDN-Capable Loops:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Unbundled ADSL-Qualified Loops:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Unbundled Loops of DS3 and Higher:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>

OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Sub-Loop Unbundling:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>

Sub-loops – because sub-loops track loops in all other respects (e.g., have three different intervals in Qwest's Standard Interval Guides depending on the number of sub-loops in an order), OP-3 and OP-4 for this submeasure shall track the approach taken for loops. In particular, the relevant interval (5 days for 1-8 subloops in an order; 6 days for 9-16 in an order; and 7 days for 17+) shall be the standard for OP-3 (i.e., the relevant interval must be met 90% of the time) and the intermediate standard – i.e., 6 days – shall be the relevant interval for OP-4.

For Unbundled Loop Conditioning:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D	<i>Installation Interval (Average Days)</i>
OP-4E	<i>Installation Interval (Average Days)</i>

Conditioned loops (i.e., accounting for the additional time necessary to “condition” a previously unconditioned loop to make it DSL ready) – the interval, as envisioned by Qwest, is 15 days, which represents the target date for installing the product. Thus, OP-3 shall require that 90% of conditioned loops be installed within the interval, unless a dispatch to the location is necessary. As for OP-4, the relevant installation interval shall be set at 16.5 days, which reflects the recognition that 10% of the conditioned loops will not be installed within 15 days, so that the relevant interval should be marginally greater than the interval.

For Line Sharing/Line Splitting:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>

Line sharing/Line splitting together –the interval for line sharing and line splitting, which shall be measured on an aggregate basis, is 3 days. Thus, OP-3 shall be that 90% of such loops shall be installed with 3 days. As for OP-4, the relevant installation interval shall be set at 3.3 days, which reflects the recognition 10% of such loops will not be installed within 3 days, so that the relevant interval should be marginally greater than the interval.

Maintenance and Repair

For Unbundled Analog Loops:

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Unbundled Non-loaded Loops (2-wire):

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Unbundled Non-loaded Loops (4-wire):

MR-5A	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-5B	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Unbundled DS1-Capable Loops:

MR-5A	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-5B	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Unbundled ISDN-Capable Loops:

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>

MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Unbundled ADSL-Qualified Loops:

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Unbundled Loops of DS3 and Higher:

MR-5A	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-5B	<i>All Troubles Cleared within 4 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Sub-Loop Unbundling:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be ISDN-BRI.

For Line Sharing/Line Splitting:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For the MR-3, MR-6, MR-7, and MR-8 measures, the relevant analog product shall be Qwest's DSL service, which is also provisioned and treated on a line shared basis.

TIER 1B

Pre-Order

For LSR:

PO-3A-1	IMA & rejected manually	<i>LSR Rejection Notice Interval (Hours:Minutes)</i>
PO-3B-1	EDI & rejected manually	<i>LSR Rejection Notice Interval (Hours:Minutes)</i>
PO-3C	Facsimile	<i>LSR Rejection Notice Interval (Hours:Minutes)</i>

For Resale and UNE-P:

PO-5A-1(a)	IMA Electronic LSRs	<i>FOCs On Time (Percent)</i>
PO-5A-2(a)	EDI Electronic LSRs	<i>FOCs On Time (Percent)</i>
PO-5B-1(a)	IMA Electronic/Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-5B-2(a)	EDI Electronic/Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-5C-(a)	Facsimile Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-8D	(POTS)	<i>Jeopardy Notice Interval (Average Days)</i>
PO-9D	(POTS)	<i>Timely Jeopardy Notices (Percent)</i>

For LNP:

PO-5A-1(c)	IMA Electronic LSRs	<i>FOCs On Time (Percent)</i>
PO-5A-2(c)	EDI Electronic LSRs	<i>FOCs On Time (Percent)</i>
PO-5B-1(c)	IMA Electronic/Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-5B-2(c)	EDI Electronic/Manual LSRs	<i>FOCs On Time (Percent)</i>
PO-5C-(c)	Facsimile Manual LSRs	<i>FOCs On Time (Percent)</i>

For LIS Trunks:

PO-5D	<i>FOCs On Time (Percent)</i>
PO-8C	<i>Jeopardy Notice Interval (Average Days)</i>
PO-9C	<i>Timely Jeopardy Notices (Percent)</i>

For Billing:

PO-7A	IMA-GUI	<i>Billing Completion Notification Timeliness (Percent)</i>
PO-7B	IMA-EDI	<i>Billing Completion Notification Timeliness (Percent)</i>

For Non-Designed Services:

PO-8A	<i>Jeopardy Notice Interval (Average Days)</i>
PO-9A	<i>Timely Jeopardy Notices (Percent)</i>

For Unbundled Loops:

PO-8B	<i>Jeopardy Notice Interval (Average Days)</i>
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Provisioning

For Residential Single Line Service:

OP-3A	<i>Installation Commitments Met (Percent)</i>
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OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Business Single Line Service:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Centrex:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Centrex 21:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>

OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For PBX Trunks:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Basic ISDN:

OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>

OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>
For UNE-P (POTS):	
OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>
For Qwest DSL:	
OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>
For Primary ISDN:	
OP-3A	<i>Installation Commitments Met (Percent)</i>
OP-3B	<i>Installation Commitments Met (Percent)</i>
OP-3C	<i>Installation Commitments Met (Percent)</i>
OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	<i>Delayed Days (Average Days)</i>
OP-4B ¹	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	<i>Delayed Days (Average Days)</i>

OP-6B-2 ¹	<i>Delayed Days (Average Days)</i>
OP-4C ¹	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	<i>Delayed Days (Average Days)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For DS0:

OP-3A	non-designed	<i>Installation Commitments Met (Percent)</i>
OP-3B	non-designed	<i>Installation Commitments Met (Percent)</i>
OP-3C	non-designed	<i>Installation Commitments Met (Percent)</i>
OP-3D	designed	<i>Installation Commitments Met (Percent)</i>
OP-3E	designed	<i>Installation Commitments Met (Percent)</i>
OP-4A ¹	non-designed	<i>Installation Interval (Average Days)</i>
OP-6A-1 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-6B-1 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-4B ¹	non-designed	<i>Installation Interval (Average Days)</i>
OP-6A-2 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-6B-2 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-4C ¹	non-designed	<i>Installation Interval (Average Days)</i>
OP-6A-3 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-6B-3 ¹	non-designed	<i>Delayed Days (Average Days)</i>
OP-4D ¹	designed	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-4E ¹	designed	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	designed	<i>Delayed Days (Average Days)</i>
OP-5		<i>New Service Installation without Trouble Reports (Percent)</i>

For DS1:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For DS3 and Higher:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>

OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For Frame Relay:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For UDIT – DS1 Level:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For UDIT – Above DS1 Level:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

For E911/911 Trunks:

OP-3D	<i>Installation Commitments Met (Percent)</i>
OP-3E	<i>Installation Commitments Met (Percent)</i>
OP-4D ¹	<i>Installation Interval (Average Days)</i>
OP-6A-4 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-4 ¹	<i>Delayed Days (Average Days)</i>
OP-4E ¹	<i>Installation Interval (Average Days)</i>
OP-6A-5 ¹	<i>Delayed Days (Average Days)</i>
OP-6B-5 ¹	<i>Delayed Days (Average Days)</i>
OP-5	<i>New Service Installation without Trouble Reports (Percent)</i>

Maintenance and Repair

For Residential Single Line Service:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Business Single Line Service:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Centrex:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Centrex 21:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For PBX Trunks:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Basic ISDN:

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For UNE-P (POTS):

MR-3A	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3B	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3C	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6A	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6B	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6C	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7A	<i>Repair Repeat Report Rate (Percent)</i>
MR-7B	<i>Repair Repeat Report Rate (Percent)</i>
MR-7C	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Qwest DSL:

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For Primary ISDN:

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>

MR-8	<i>Trouble Rate (Percent)</i>
For DS0:	
MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>
For DS1:	
MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>
For DS3 and Higher:	
MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>
For Frame Relay:	
MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>
For UDIT – DS1 Level:	
MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>
For UDIT – Above DS1 Level:	
MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>

MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

For E911/911 Trunks:

MR-3D	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-3E	<i>All Troubles Cleared within 24 Hours (Percent)</i>
MR-6D	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-6E	<i>Mean Time to Restore (Hours:Minutes)</i>
MR-7D	<i>Repair Repeat Report Rate (Percent)</i>
MR-7E	<i>Repair Repeat Report Rate (Percent)</i>
MR-8	<i>Trouble Rate (Percent)</i>

TIER 1C

Billing

BI-1A	<i>Time to Provide Recorded Usage Records (Average Days)</i>
BI-1B	<i>Time to Provide Recorded Usage Records (Percent)</i>
BI-3A	<i>Billing Accuracy – Adjustments for Errors (Percent)</i>
BI-3B	<i>Billing Accuracy – Adjustments for Errors (Percent)</i>
BI-4A	<i>Billing Completeness (Percent)</i>
BI-4B	<i>Billing Completeness (Percent)</i>

Each billing measure (BI-1A/BI-1B; BI-3A/BI-3B; and BI-4A/BI-4B) will be subject to a per measure cap of a base payment of \$5,000 per month, subject to a maximum escalation of \$30,000 per measure.

TIER 2

Continuing Non-Conforming Performance

See Section 10.3.

Work Completion Timeliness

PO-6	<i>Work Completion Notification Timeliness (Hours:Minutes)</i>
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This measure shall be on a Tier 2 basis (measuring aggregate performance to all CLECs) and shall be calculated as follows:

<u>Performance</u>	<u>Monthly Payment</u>
1-1.49 hrs	\$10,000
1.5-1.99 hrs	\$15,000
2-2.49 hrs	\$20,000
2.5-2.99 hrs	\$25,000
3-3.49 hrs	\$30,000
3.5-3.99 hrs	\$35,000
4-4.49 hrs	\$40,000
4.5-4.99	\$45,000
5+	\$50,000

Regionwide Wholesale Support Systems

The following submeasures, which relate to the quality of Qwest's computer systems and call centers, are recorded only on a regionwide (14 state) basis:

GA-1A Appointment Scheduler	<i>Gateway Availability – IMA-GUI (Percent)</i>
GA-1B Fetch-N-Stuff	<i>Gateway Availability – IMA-GUI (Percent)</i>
GA-1C Data Arbiter	<i>Gateway Availability – IMA-GUI (Percent)</i>
GA-2	<i>Gateway Availability – IMA-EDI (Percent)</i>
GA-3	<i>Gateway Availability – EB-TA (Percent)</i>
GA-4	<i>Gateway Availability – EXACT (Percent)</i>
GA-6	<i>Gateway Availability – GUI – Repair (Percent)</i>
PO-1A-1	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-1	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-2	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-2	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-3	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-3	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-4	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-4	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-5	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-5	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-6	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-6	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-7	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-7	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1A-8	<i>Pre-Order/Order Response Times(Seconds)</i>
PO-1B-8	<i>Pre-Order/Order Response Times(Seconds)</i>
OP-2	<i>Calls Answered within Twenty Seconds – Interconnect Provisioning Center (Percent)</i>
MR-2	<i>Calls Answered within Twenty Seconds – Interconnect Repair Center (Percent)</i>

PO-1A and PO-1B shall have their transaction types aggregated together.

For Colorado, Qwest shall make a Tier-2 payments based upon monthly performance results according to the following schedule. (On this measure, the total payment, for all 14 Qwest states, shall actually be a multiple of the one noted below.)

<u>Measure</u>	<u>Performance</u>	<u>Payment</u>
GA-1,GA-2,	1% or lower	\$1,000
GA-3,GA-4	>1% to 3%	\$10,000
GA-6	>3% to 5%	\$20,000
	> 5%	\$30,000
PO-1	2 sec or less	\$1,000
	>2 sec to 5 sec	\$5,000
	>5 sec to 10 sec	\$10,000
	> 10 sec	\$15,000
OP-2/MR-2	1% or less	\$1,000

>1% to 3%	\$5,000
>3% to 5%	\$10,000
>5%	\$15,000

Handling of Local Service Requests

PO-10 *LSR Accountability (Percent)*

<u>Performance</u>	<u>Payment</u>
99-99.5	\$10,000
98.5-98.99	\$20,000
98-98.49	\$30,000
97.5-97.99	\$40,000
97-97.49	\$50,000
96.5-96.99	\$60,000
96-96.49	\$70,000
95.5-95.99	\$80,000
95-95.49	\$90,000
below 95%	\$100,000

If the PO-10 measure at the end of any month dips below 95%, the Commission may commence a proceeding to determine whether the problem is being remedied and to determine whether any other action is appropriate.

Electronic Flow Through Rates

For Resale:

PO-2A-1 IMA Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2A-2 GUI Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-1 IMA Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-2 GUI Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>

For Unbundled Loops:

PO-2A-1 IMA Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2A-2 GUI Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-1 IMA Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-2 GUI Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>

For LNP:

PO-2A-1 IMA Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2A-2 GUI Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-1 IMA Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-2 GUI Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>

For UNE-P (POTS):

PO-2A-1 IMA Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2A-2 GUI Flow-through LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-1 IMA Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>
PO-2B-2 GUI Flow-through Eligible LSRs	<i>Electronic Flow-through (Percent)</i>

Qwest shall be required to meet a standard for either eligible flow-through (PO-2B-1 & PO-2B-2 aggregated) or actual flow-through (PO-2A-1 & PO-2A-2 aggregated). If Qwest misses the standard for both PO-2B and PO-2A, it shall pay payments on the measure in which it performed closer to the relevant standard.

The following table sets out the relevant standard for measuring acceptable levels of actual flow-through (PO-2A) and flow-through eligible orders (PO-2B).

Flow-through Orders (PO-2A)	January <u>2002</u>	July <u>2002</u>	January <u>2003</u>	July <u>2003</u>
Resale	70%	80%	85%	85%
Unbundled Loops	50%	60%	70%	75%
LNP	70%	80%	85%	85%
UNE-P (POTS)	50%	65%	80%	85%

Flow-through Eligible Orders (PO-2B)	January <u>2002</u>	July <u>2002</u>	January <u>2003</u>	July <u>2003</u>
Resale	80%	90%	95%	95%
Unbundled Loops	60%	70%	80%	85%
LNP	80%	90%	95%	95%
UNE-P (POTS)	60%	75%	90%	95%

The relevant payment shall be computed on a quarterly basis and shall take the performance on the better of the eligible flow through orders (PO-2B) or actual orders to flow through (PO-2A) and apply a \$75,000 payment for each 2.5% that the relevant measurement differs from the standard. This payment shall not exceed \$600,000 per submeasure (resale, unbundled loop, LNP, UNEP). By way of illustration, the payment table for eligible flow through orders for resale for beginning January, 2002 is:

Resale:	77.5%-79.99%	\$ 75,000
	75.0%-77.49%	\$150,000
	72.5%-74.99%	\$225,000
	70.0%-72.49%	\$300,000
	67.5%-69.99%	\$375,000
	65.0%-57.49%	\$450,000
	62.5%-64.99%	\$525,000
	below 62.49%	\$600,000

Change Management Requirements

PO-16 *Release Notification on Time (Calendar Days)*

For failing to notify competitors of the first announcement on time, Qwest shall pay a payment of \$200/per day. For failing to notify competitors of subsequent release dates (i.e., the final requirements and final release notes), Qwest shall pay a payment of \$50/day.

GA-7 *Timely Outage Resolution following Software Releases (Percent)*

Failure to resolve software outages within 48 hours shall result in a \$100,000 payment by Qwest for each additional 48 hours out of service.

PO-18(CPAP) *Interface Versions Availability (Percent)*

A failure to reinstate a pulled version that had not been available for 6 months within 24 hours shall result in a \$50,000 payment, with half of the payment going to the CLEC who brings the complaint and the other half going into the Special Fund.

APPENDIX B

**(PERFORMANCE INDICATOR DEFINITIONS – TO BE SUPPLIED BY
QWEST)**

EXHIBIT F

BEFORE THE PUBLIC UTILITIES COMMISSION OF COLORADO

Docket No. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES
FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN
COLORADO

Docket No. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF
1996.

VERIFICATION OF R. STEVEN DAVIS

By Decision No. C02-399 adopted March 27, 2002 the Commission ordered Qwest to file a verified statement indicating acceptance or non-acceptance of the Colorado Assurance Plan contained in the decision and attachments thereto and approved by the Commission.

R. Steven Davis, of lawful age and being first duly sworn, deposes and states:

1. My name is Robert Steven Davis. I am Senior Vice President, Policy and Law for Qwest Corporation in Denver, Colorado.
2. Qwest Corporation agrees to offer the Colorado Performance Assurance Plan attached to Decision No. C02-399, as a part of its Colorado Statement of Generally Available Terms and Conditions ("SGAT") in support of its section 271 filing with the Federal Communications Commission, subject to clarification by the Commission in accordance with Qwest's Motion for Clarification filed contemporaneously with this Verification.

R. Steven Davis

SUBSCRIBED AND SWORN to before me this _____ day of April, 2002.

Notary Public

My Commission Expires:

EXHIBIT G

BEFORE THE PUBLIC UTILITIES COMMISSION OF COLORADO

Docket No. 01I-041T

IN THE MATTER OF THE INVESTIGATION INTO ALTERNATIVE APPROACHES
FOR A QWEST CORPORATION PERFORMANCE ASSURANCE PLAN IN
COLORADO

Docket No. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF
1996.

QWEST'S MOTION FOR CLARIFICATION

Qwest Corporation ("Qwest") through its undersigned counsel hereby respectfully petitions for clarification of one aspect of the Commission's Decision on Remand and Other Issues Pertaining to the Colorado Assurance Plan, Decision No. C02-399, Adopted March 27, 2002. As grounds for its Motion, Qwest states the following:

1. On January 7, 2002, Qwest filed its Motion for Limited Remand of CPAP Issues, seeking remand to the Special Master of four issues related to the Commissions proposed performance assurance plan. One of those issues was "the Commission's reservation of right unilaterally to change the CPAP." January 10, 2002 Order, at 3.
2. After Remand, the Special Master issued his Supplemental Report and Recommendation of the Special Master, dated February 15, 2002 ("Supplemental Recommendation"), in which he recommended modifying the CPAP to specify the circumstances under which the plan would be subject to change. In response to the

Supplemental Recommendation, the Commission modified section 18.0 of the CPAP to specifically address future changes to the plan. See e.g., March 27 Decision at pp. 30-42.

3. The revised CPAP mailed April 10, 2002 as Attachment A to Decision No. C02-399 contains a provision that is inconsistent with CPAP Section 18.0. Section 16.9 of the CPAP states: "The Commission shall have the right to modify this plan at any time as appropriate." In order to avoid confusion and inconsistency with the provisions in section 18.0 of the CPAP, Qwest requests that the Commission clarify the language in section 16.9 as follows: "The Commission shall have the right to modify this plan ~~at any time as appropriate~~ in accordance with section 18.0."

Respectfully submitted this 17th day of April, 2002.

Qwest Services Corporation

Lynn Anton Stang (#18428)
1801 California Street
Suite 4900
Denver, Colorado 80202
(303) 672-5823
(303) 298-8197(Fax)

Kris A. Ciccolo (#17948)
1005 17th Street, Suite 200
Denver, CO 80202
(303) 896-5675
(303) 896-6095 (Fax)

Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that an original and five copies of the above and foregoing
MOTION FOR CLARIFICATION was hand delivered on this 17th day of April, 2002,
to the following:

**Mr. Bruce N. Smith
Colorado Public Utilities Commission
Executive Secretary
1580 Logan St., Office Level 2
Denver, CO 80203

a true and correct copy has been hand delivered to:

**Mana L. Jennings-Fader
Assistant Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

Wendie L. Allstot
Public Utilities Commission
1580 Logan Street, Office Level 2
Denver, CO 80203

**Professor Philip J. Weiser (two copies)
Colorado Public Utilities Commission
1580 Logan Street, Office Level 2
Denver, CO 80203

and a copy was served electronically on the electronic distribution list maintained by
Special Master Professor Weiser.
